104

(3)

No. 07-1501

Supreme Court, U.S.
FILED
AUG 1 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

IKON OFFICE SOLUTIONS, INC., and
GENERAL ELECTRIC CAPITAL CORPORATION,

Petitioners,

v.

NEWCAL INDUSTRIES, INC.; CPO, LTD.;
PINNACLE DOCUMENT SYSTEMS, INC.;
PACIFIC OFFICE AUTOMATION, INC.; and
KEARNS BUSINESS SOLUTIONS, INC.;

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAXWELL M. BLECHER
JAMES R. NOBLIN
BLECHER & COLLINS
515 South Figueroa Street,
17th Floor
Los Angeles, California
90071-3334
(213) 422-6222

JAMES A. HENNEFER
Counsel of Record
HENNEFER, FINLEY &
WOOD, LLP
425 California Street,
19th Floor
San Francisco, California
94104
(415) 421-6100

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether an antitrust relevant product market may exist for replacement copier equipment and service where: (a) there is no reasonable interchangeability of the products in that market with other products; (b) where market imperfections and anticompetitive acts explicitly targeting plaintiff-competitors have created this inelasticity; (c) the relevant market is confined solely to an aftermarket derivative of a competitive market; (d) market power does not derive from contracts in the competitive market; and (e) the competitive market does not discipline anticompetitive practices in the aftermarket, in spite of the fact that consumers in this product market are customers of a single entity having fraudulently procured aftermarket contracts that help exclude business rivals?

2. Whether the RICO proximate-cause requirement is satisfied where the RICO scheme consists of intentional torts committed against defendants' customers and expressly targets plaintiffs, causing plaintiffs to have to pay monies directly to defendants and directly to lose specific customers?

3. Whether the RICO requirements for an associated-in-fact enterprise are met by an organization of corporate entities bound together, operating under long term contracts both for legitimate purposes and to accomplish the RICO scheme, with a mechanism for decision making, controlling and directing the affairs of the enterprise on an ongoing basis, continuity of structure

QUESTIONS PRESENTED – Continued

and personnel, a common and shared purpose, and central administrative functions?

4. Whether the Declaratory Judgment Act may be invoked to determine the validity of contracts which plaintiffs believe to be void but defendants believe to be valid and as to which defendants have threatened suit against plaintiffs for tortious interference with such contracts?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals were:

NewCal Industries, Inc.; CPO, Ltd.; Pinnacle Document Systems, Inc.; Pacific Office Automation, Inc.;[1] and Kearns Business Solutions, Inc. (plaintiffs-appellants); and

IKON Office Solutions, Inc., and General Electric Capital Corporation (defendants-appellees).

RULE 29.6 STATEMENT

The common stock of Pinnacle Document Systems, Inc. is held by Sharp Electronics Corporation. No publically held corporation owns 10% or more of any of the other respondents' stock.

---

[1] Petitioners, apparently following the clerical error in the caption of the Ninth Circuit opinion, have omitted Pacific Office Automation, Inc. as a plaintiff. Pacific Office Automation has been a party from the inception of this suit, was named in the original Complaint and in the First Amended Complaint, and was one of the "[f]ive lessors of copier equipment (collectively "Newcal")" that were the subject of the entire Ninth Circuit opinion. (513 F.3d 1038)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
RULE 29.6 STATEMENT	iii
TABLE OF AUTHORITIES	vii
STATEMENT OF THE CASE	1
I. Proceedings at the Ninth Circuit	1
II. Overview of Ninth Circuit Opinion	1
III. Summary of Facts	3
ARGUMENT AGAINST GRANTING CERTIORARI	7
I. Antitrust Relevant Markets	7
A. Classic Relevant Market Precedent of This Court Was Applied by the Ninth Circuit	10
B. The Ninth Circuit's Comparison of Newcal's Allegations with *Kodak* versus *Queen City* and *Forsyth* Is Correct	11
C. The Ninth Circuit Does Not Conflict with the Second, Fifth and Eleventh Circuits	13
D. Petitioners Misrepresent *Kodak* and Its Impact	16

TABLE OF CONTENTS – Continued

Page

E. Newcal's Allegations of "Practical Indicia" Separating Its Derivative Relevant Markets from the Competitive Interbrand Market for Original Contracts 18

II. The RICO Issues 19

A. "Proximate Cause" Requirement Under RICO 21

1. "Proximate Cause" Standards in *Bridge* 21

2. Attenuated Causation in *Anza v. Ideal Steel Supply Co.* 24

3. The Ninth Circuit Opinion Is Not in Conflict With the Seventh Circuit Decision in *Israel Travel* 25

4. "Judicial Tools" for Determination of "Proximate Cause" of *Anza* and *Bridge* Were Correctly Applied by the Ninth Circuit 27

B. "Associated-in-Fact Enterprise" Requirement Under RICO 28

1. The Circuit Split Over the Degree of Structure an Associated-in-Fact RICO "Enterprise" Requires Is Decades Old, With No Action by Congress or This Court and No Ill-Effects 29

TABLE OF CONTENTS – Continued

Page

2. *Odom*, On Which the Ninth Circuit Relied, Was Properly Decided Under This Court's Precedent in *Turkette* 31

3. Newcal's RICO Statement Satisfies The Stricter Standards of RICO Associated-in-Fact Enterprise Structure of Other Circuits ... 33

III. The Declaratory Judgment Claim 34

CONCLUSION 37

APPENDIX

First Amended Complaint ..... App. 1

Exhibit A, IKON Office Solutions, Images Plus Program Addendum ..... App. 99

Exhibit B, IKON Office Solutions, Copy Management Program Addendum ..... App. 100

Exhibit C, Plaintiffs' RICO Statement ..... App. 101

TABLE OF AUTHORITIES

Page

CASES

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) 22, 24, 27, 28

Bridge v. Phoenix Bond & Indemnity Co., ___ U.S. ___, 128 S. Ct. 2131 (June 9, 2008) (No. 07-210) ..... *passim*

Brown Shoe Co., Inc. v. United States, 365 U.S. 825 (1962) 8, 9, 10, 18

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 2, 32

Chang v. Cheng, 80 F.3d 1293 (9th Cir. 1996) 32, 39

Derosier v. New England Tel. & Tel. Co., 81 N.H. 451, 130 A. 145 (1925) 23

Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co., 416 F.2d 707 (7th Cir. 1969) 35, 36

Diaz v. Gates, 420 F.3d 897 (9th Cir. 2005) 3, 19

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) ..... *passim*

Forsyth v. Humana, Inc., 114 F.3d 1467 (9th Cir.) ..... *passim*

GTE Directories Publishing Corporation v. Trimen America, Inc., 67 F.2d 1563 (11th Cir. 1995) 35

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 32

TABLE OF AUTHORITIES – Continued

Page

Hack v. President & Fellows of Yale College, 237 F.3d 81 (2nd Cir. 2000) 14

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 2, 22, 27, 38

Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250 (7th Cir. 1995) 25

Limestone Development Corp. v. Village of Lemont, Ill., 520 F.2d 797 (7th Cir. 2008) 30

Maris Distributing Co. v. Anheuser-Busch, Inc., 302 F.3d 1207 (11th Cir. 2002) 15, 16

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 36

Microsoft Corp. v. Odom, 128 S. Ct. 464 (Oct. 15, 2007) (No. 07-138) 20, 28

Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc., 18 F.3d 260 (4th Cir. 1994) 26

National Basketball Association v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir. 1987) 35

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 2

NewCal Industries Inc., et al. v. IKON Office Solution, et al., 513 F.3d 1038 (9th Cir. 2008) ..... *passim*

Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) 24

Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997) 8, 9, 11, 12, 13

Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479 (1985) 2, 31, 32

Seidel v. Greenberg, 108 N.J. Super. 248, 260 A.2d 863 (1969) 23

Simon v. Value Behavioral Health, Inc., 208 F.3d 1073 (9th Cir. 2000) 33, 39

Societe de Conditionnement en Aluminium v. Hunter Engineering Co., 655 F.2d 938 (9th Cir. 1981) 35

Steffel v. Thompson, 415 U.S. 452 (1974) 36

Terrace v. Thompson, 263 U.S. 197 (1923) 36

United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exchange, 89 F.3d 233 (5th Cir. 1996) 14, 15

United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956) 7

United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983) 29

United States v. Turkette, 452 U.S. 576 (1981) 2, 30, 31, 32

United States v. Weinstein, 762 F.2d 1522 (11th Cir. 1985) 29

Wagh v. Metris Direct, Inc., 348 F.3d 1102 (9th Cir. 2003) 33, 39

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

18 U.S.C. § 1341 26

28 U.S.C. § 2201 36

Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* 34

Lanham Act, 15 U.S.C. § 1125(a)(1)(B) 3

The Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* 19, 20, 24, 30

Sherman Act, 15 U.S.C. § 1 16

Fed. R. Civ. P., Rule 12(b)(6) 1, 3, 7, 19, 37

OTHER AUTHORITIES

1 ABA Antitrust Section, *Antitrust Law Developments* (5th Ed. 2002) 17

1 ABA Antitrust Section, *Antitrust Law Developments* (6th Ed. 2007) 17

Goldfine & Vorrasi, *The Fall of the Kodak Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 Antitrust L.J. 209 (2004) 17

Lampert, *Antitrust in IP Licensing: Selected Concerns and Considerations*, SN 051 ALI-ABA 237 (2007) 17

TABLE OF AUTHORITIES – Continued

Page

MacKie-Mason, Metzler, *Links Between Vertically Related Markets, Kodak* (1992), in *The Antitrust Revolution, Economics Competition and Policy* (3d Ed. 1999) 18

Restatement (Second) of Torts (1979) § 870 23

STATEMENT OF THE CASE

I. Proceedings at the Ninth Circuit

The Ninth Circuit's unanimous opinion of January 23, 2008 reversed the district court's dismissal of the entire case on a Rule 12(b)(6) motion.[2] Petitioners filed a Petition for Panel Rehearing or Rehearing En Banc with the Ninth Circuit on February 13, 2008. On March 7, 2008, the petition to the Ninth Circuit was unanimously denied, with no judge on the court requesting a vote for *en banc* rehearing.

II. Overview of Ninth Circuit Opinion

The Ninth Circuit opinion is very limited in scope. It applied conventional legal standards of this Court in deciding the antitrust, RICO and declaratory relief issues in this case and in finding that, on the extensive facts in the pleadings (which are set out in full below at Respondents' Appendix, App. 1- App. 147,) Newcal had satisfied those standards. It held, on the four issues as to which petitioners seek certiorari, that:

> (1) under this Court's decision in *Kodak*[3] "Newcal's market definition does not fail as a matter of law, at least on a Rule 12(b)(6) motion";

---

[2] The Ninth Circuit's opinion is reported at 513 F.3d 1038.

[3] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992) ("*Kodak*").

(2) under this Court's decision in *Holmes*[4] "RICO standing requires compensable injury and proximate cause" and the case should be remanded to the district court for "reconsideration of the compensable injury requirement" and "for further consideration of the proximate cause requirement under the appropriate standard";

(3) under the Ninth Circuit's view of this Court's RICO decision in *Turkette,*[5] and its decisions on RICO in *Sedima,*[6] *Scheidler*[7] and *Kushner*[8] "Newcal's complaint alleges a sufficient enterprise-in-fact"; and

(4) because "IKON had threatened to sue Newcal for 'interfering with its existing and potential business relationships'" Newcal did not lack constitutional standing to request declaratory relief that the business relationships with which it interfered were not legally protectable.

---

[4] *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 112 S. Ct. 1311, 117 L.Ed.2d 532 (1992) ("*Holmes*").

[5] *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981) ("*Turkette*").

[6] *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L.Ed.2d 346 (1985) ("*Sedima*").

[7] *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 114 S. Ct. 798, 127 L.Ed.2d 99 (1994) ("*Scheidler*").

[8] *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S. Ct. 2087, 150 L.Ed.2d 198 (2001) ("*Kushner*").

These factually-bound holdings of the Ninth Circuit (like its holdings on the RICO requirement of injury to "business or property" and Lanham Act which petitioners do not challenge) do not involve novel rules of law. They decide how the facts pleaded apply to established legal standards.[9]

III. Summary of Facts

The facts of the case set out in the petition are incomplete and inaccurate.[10] Because this case is so fact-bound, respondents provide an initial statement of certain essential facts here and provide the detailed facts of the First Amended Complaint ("FAC") in Respondents' Appendix ("Resp. App."), below.

This case involves a widespread fraudulent and anticompetitive practice used by IKON and GE known as "flexing." IKON and GE lease copier equipment to customers on a "cost-per-copy" basis. This lease bundles equipment, service, and supplies.

---

[9] The Ninth Circuit held, on the RICO requirement of injury to "business or property," that: "[t]he District Court has not had the opportunity to consider [Ninth Circuit's 2005 *en banc* decision in] *Diaz* [*Diaz v. Gates*, 420 F.3d 897]" and returned this issue to the district court "for reconsideration of the compensable injury requirement under *Diaz*." 513 F.3d at 1055. The Ninth Circuit held, on the Lanham Act claim, that: "[b]ecause the district court's conclusions with respect to four of those five statements rested on factual findings rather than legal conclusions, we reverse the Rule 12(b)6) dismissal and remand Newcal's Lanham Act claim." 513 F.3d at 1052.

[10] Petition, pages 4-5.

It ostensibly requires monthly payments for a lease term of just 5 years. After 5 years the customer should be able to seek competitive alternatives. But it cannot, because unbeknownst to the customer IKON and GE have extended its lease term – and its payments.

"Flexing" was initiated by IKON in the 1990's. It was subsequently ratified, adopted and carried on by GE, when GE bought IKON's copier leases in 2004, hired IKON personnel and began administering the "flexes." At the heart of "flexing" is the practice of intentionally deceiving customers to obtain extensions of their original 5-year cost-per-copy leases, without the customer knowing.

IKON's fraudulent conduct was colorfully described in a ditty sung about IKON's business practices by IKON salespersons. It was sung to the tune of "Nick Nack Paddy Wack Give the Dog a Bone (This Old Man Goes Rolling Home)":

"I con you;
You con me;
We con customers daily;
With a flex 'em in;
And a flex 'em out;
And cost per copies all about."

IKON had manuals teaching how to "con" customers in order to "flex" them and lock them in when their lease should end after 5 years. It designed deceptive amendment forms to effect the "flex" of its customers. It removed from its forms standardized

written disclosures to the customers about the lease amendment and then refused the requests of its own employees to restore them. It trained its salespersons to present the "flex" to the customer in a way to conceal the lease extension. It trained its salespersons to give false facts and false responses to standard customer inquiries about the amendment. It devised ways of continuing to conceal the "con" from the customer. It kept two sets of books on the customer's account, one specifically labeled "DO NOT SHARE WITH CUSTOMER," since it would reveal to the customer the fact of the "flex" and its economic effect.

IKON expressly stated in writing its targeting of competitors and its anticompetitive intent in its Field Training Manual for "flexing." "Flexing" in IKON's own words was designed to "**creat[e] separation [of the customer] from the competition**" at the end of 5 years. IKON used the following bullet-point training graphic, targeting its competitors:

What is Flexing?

- **Virtually impossible for competition to penetrate account**

These IKON practices were used nationwide, on all manner of customers, including non-profits, schools, hospitals, financial institutions, insurance companies and law firms. IKON's practices raised the prices IKON customers paid for replacement copiers in the aftermarket to 50%, 100%, or more, above potential competitive substitutes. Over 80% of IKON

customers were foreclosed from dealing with competitors of IKON and GE at lease-end by these practices.

In March 2004, GE bought $1.9 billion of IKON's leases and took over administration of IKON's lease accounts. GE immediately began selling GE "cost-per-copy" leases to "flexed" IKON customers. IKON's practices were continued by GE and its "flexes" were enforced by GE, through a series of agreements between GE and IKON and with others. GE continued to prevent competition for "flexed" accounts at lease-end, using the same fraudulent IKON "flexes" and new ones of its own.

IKON and GE were able to exercise market power over flexed customers, to price discriminate between their customers and to prevent competition in the replacement aftermarket at lease-end. This was because of a number of "market imperfections" unique to copier leasing. These included: the custom of financing through cost-per-copy contracts; the impossibility of life-cycle costing such contracts; copier equipment losing 90% of its residual value over its first 5 years; and, inefficient markets for used copier equipment. These "market imperfections" and IKON's and GE's "flexing" practices worked together to prevent reasonable interchangeability and cross-elasticity of demand for competitors' products in the replacement aftermarkets. These replacement aftermarkets have all of the "practical indicia" of economically distinct markets. Potential competitors of IKON and GE for replacement copiers and service were either foreclosed entirely from these aftermarkets or, occasionally,

paid the exorbitant sums demanded by IKON and GE to buy customers out of their "flexes."

ARGUMENT AGAINST GRANTING CERTIORARI

Because the Ninth Circuit carefully applied this Court's legal standards to the facts in the FAC, its holdings are narrow and unremarkable. The case is not worthy of certiorari on this basis. Because the Ninth Circuit's opinion does not conflict with other circuits on the relevant market issue, the RICO "proximate cause" issue or the declaratory relief issue, it is not worthy of certiorari on these issues. On the RICO enterprise issue this Court just denied certiorari in *Odom*, on which the Ninth Circuit relied *in toto*, making this issue also not worthy of certiorari.

I. Antitrust Relevant Markets

On the antitrust relevant market issue, the Ninth Circuit carefully passed Newcal's allegations in the FAC through three increasingly finer legal sieves before concluding that they survived petitioners' Rule 12(b)(6) motion. These sieves were: (a) the classic market definition standards of this Court in *duPont*,[11]

[11] *U.S. v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L.Ed. 1264 (1956) ("*duPont*").

Brown Shoe[12] and *Kodak*: (b) the *Kodak* dual-market/ separate derivative aftermarket requirements, contrasted with the single-market franchise-type precedents of *Queen City Pizza*[13] and *Forsyth*;[14] and (c) the *Brown Shoe* requirements that "practical indicia" show the derivative aftermarket is "an independent economic entity."

(a) The Ninth Circuit recognized that although market definition was "typically a factual element," there were "some legal principles that govern the definition of an antitrust 'relevant market,' and a complaint may be dismissed under Rule 12(b)(6) if the complaint's 'relevant market' definition is facially unsustainable." It therefore started with the classic standards for defining an antitrust product market, in *duPont* and *Brown Shoe*. The Ninth Circuit found that Newcal's two alleged product markets facially met these requirements.

(b) The Ninth Circuit carefully applied these standards and the more specific market definition standards laid out by this Court in *Kodak* for this situation (*viz.* restraints and monopolization in derivative "aftermarkets"), to determine whether

---

[12] *Brown Shoe Company, Inc. v. U.S.*, 365 U.S. 825, 81 S. Ct. 711, 8 L.Ed. 2d 510 (1962) ("*Brown Shoe*").

[13] *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3rd Cir. 1997) ("*Queen City Pizza*").

[14] *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997) ("*Forsyth*").

these applied to the facts, or, whether Ninth Circuit (*Forsyth*) and Third Circuit (*Queen City Pizza*) precedent, used for franchise-type arrangements, applied. It concluded that *Kodak* more closely resembled the facts pleaded here. It held, narrowly, that "[w]e therefore reverse the district court's holding that *Queen City Pizza* and *Forsyth* render Newcal's complaint legally invalid." The Ninth Circuit cautioned that "[a]ll of these questions ["the actual existence" of the defined product market and market power] remain open for resolution – either for or against Newcal – upon remand."

This is hardly, as characterized by petitioners, "far reaching," or deviating from "conventional definition[s]," or creating a "sharp conflict with several other courts of appeals."[15] In fact, the Ninth Circuit merely applied *Kodak*, and its precedent in *Forsyth* does not conflict with, but is consistent with *Queen City Pizza*, and with the additional cases from the Second, Fifth and Eleventh Circuits which petitioners cite.

(c) The Ninth Circuit, after concluding that "there is no *per se* rule against recognizing contractually-created submarkets" like *Kodak* which are "potentially viable when the market at issue is a wholly derivative aftermarket" found that the allegations of Newcal's FAC sufficiently alleged a cognizable market under the *Brown Shoe* "practical indicia."

---

[15] Petition, page 2.

A. Classic Relevant Market Precedent of This Court Was Applied by the Ninth Circuit

The two relevant product markets accepted by the Ninth Circuit were defined in terms of:

> (1) "a *product* market";
>
> (2) where "the outer boundaries of [such] product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it . . . and . . . include 'the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business"; and
>
> (3) where the market may be "economically distinct from the general product market" based on "'practical indicia' of an economically distinct submarket: 'industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.' [Citation to *Brown Shoe*]."

513 F.3d at 1045.

Newcal's FAC contains extensive factual allegations showing that the requirements of these precedents were met.[16]

---

[16] (Resp. App. 25, 26-28 (product market, separate economic entity); 9, 28, 31-32 (lack of substitutability and cross-elasticity);

(Continued on following page)

B. The Ninth Circuit's Comparison of Newcal's Allegations with *Kodak* versus *Queen City* and *Forsyth* Is Correct

The Ninth Circuit, then carefully compared the franchise-type cases, *Queen City* and *Forsyth* with *Kodak*. It found "three relevant principles" emerged.

> (1) "[T]he law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue (as in *Eastman Kodak*)."
>
> (2) "[T]he law prohibits an antitrust claimant from resting on market *power* that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant (as in *Queen City* and *Forsyth*)."
>
> (3) "[T]he law permits an inquiry into whether a consumer's selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in an aftermarket."

513 F.3d at 1048-1049.

The Ninth Circuit then looked carefully at the basic factual allegations in Newcal's FAC. Its conclusions were again unremarkable – that these allegations were significantly different factually from a franchise case and more economically akin to the

---

29-33 (distinct customers, distinct prices, insensitivity to price changes, price discrimination).

derivative aftermarkets in *Kodak*. The Ninth Circuit found that:

> (1) unlike franchise cases, "the complaint . . . alleges the existence of two separate but related markets in interbrand copier equipment and service," an aftermarket "more like the aftermarket in *Eastman Kodak* than the aftermarket in *Queen City Pizza* and *Forsyth* in one critical respect: the aftermarket here is wholly derivative from and dependent on the primary market";[17]
>
> (2) the alleged illegal restraints and monopolization in the flex amendments "relate only to the aftermarket, not to the initial market," the "flex agreements are not part of the initial market as they were in *Queen City Pizza*," and "IKON obtains the flex agreements only *after* obtaining an initial lease or contract";
>
> (3) "IKON does not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market"; and
>
> (4) "market imperfections, as well as IKON's fraud and deceit, prevent consumers from realizing that their choice in the initial

---

[17] This economic situation allowed, as in *Kodak*, "exploitation of a natural monopoly to gain monopoly power in the [separate] derivative services market . . . even though its monopoly power in services was neither naturally nor contractually created."

> market will impact their freedom to shop in the aftermarket."

513 F.3d at 1049-1050.

The net result of this portion of the Ninth Circuit's detailed relevant market inquiry is not unusual – that "there is no *per se* rule against recognizing contractually-created submarkets and that such submarkets are potentially viable when the market at issue is a wholly derivative aftermarket." 513 F.3d at 1051.

C. The Ninth Circuit Does Not Conflict with the Second, Fifth and Eleventh Circuits

In their petition for rehearing at the Ninth Circuit, petitioners argued, as they do here, that "[t]he Panel's Decision on the central antitrust issue conflicts with this Court's decision in *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), and with *Queen City Pizza, Inc. v. Domino's Pizza, Inc.* 124 F.3d 430 (3rd Cir. 1997) and decisions of several other courts of appeals, . . . "[18] No judge on the Ninth Circuit even requested a vote for rehearing *en banc* to consider the alleged intra-circuit conflict. Moreover, the Ninth Circuit opinion does not conflict with its

---

[18] Petitioners not only do not address the Ninth Circuit's discussion of *Forsyth*, but intentionally avoid it, misquoting the Ninth Circuit's statement of the case, as "determining whether this case is more like *Queen City Pizza* . . . or more like *Eastman Kodak*" rather than "determining whether this case is more like *Queen City Pizza* ***and Forsyth*** or more like *Eastman Kodak*." (Emphasis supplied.) Petition, page 11.

own precedent in *Forsyth* nor with like precedent in the Second, Third, Fifth and Eleventh Circuits.

In *Forsyth* the Ninth Circuit rejected a proposed market definition based on voluntarily-entered-into Humana insurance policies which contained explicit contractual provisions limiting insured to certain hospitals. "Similar to the franchisees' claim in *Queen City Pizza*, the insureds' antitrust claim defined the 'relevant market' to include only those hospital consumers who had Humana insurance policies" – an alleged submarket "whose boundaries depended entirely on a [single voluntary] written contract." 513 F.3d at 1047.

The Second Circuit case, *Hack v. Yale*, 237 F.3d 81 (2nd Cir. 2000) ("*Hack*") is even further afield from *Kodak* and the Ninth Circuit opinion. In *Hack*, the Second Circuit rejected a relevant market definition consisting of unmarried freshmen and sophomores at Yale College who had matriculated fully aware of the parietal rule requiring them to reside in university housing, only later to claim the rule violated the antitrust laws. The Second Circuit found that "plaintiffs . . . are somewhat unclear about what constitutes the relevant market," and with no more market allegations than that they were contractually bound to the parietal rule, economic power derived solely from a single voluntary contract and was insufficient. 237 F.3d at 85. This is not the case here.

The Fifth Circuit case, *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exchange*, 89 F.3d 233 (5th Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997) ("*United Farmers Agents*") is also far afield from *Kodak* and

the Ninth Circuit opinion. It supports Newcal. *United Farmers Agents* held that "economic power derived from contractual agreements such as franchises or in this case, the agents' [voluntary] contracts with Farmers, 'has nothing to do with market power, ultimate consumers' welfare or antitrust.'" It dismissed the case on summary judgment. The *United Farmers Agents* court, in applying *Kodak*, found that plaintiffs on summary judgment "cited no evidence that information or switching costs were high . . . and offer no evidence that Farmers attempted to engage in price discrimination." 89 F.3d at 237. Newcal, to the contrary, has extensive allegations in the FAC that information and switching costs are high and that IKON and GE engage in price discrimination in the alleged relevant product markets.[19]

The Eleventh Circuit case cited by petitioners, *Maris Distributing Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207 (11th Cir. 2002) ("*Maris*"), is even further afield from *Kodak* and the Ninth Circuit opinion. After hearing the evidence at trial, the district court in *Maris* directed a verdict that the distributorship agreement knowingly entered into did not allow plaintiffs to merely claim that "contract power should automatically be equated with market power." The Eleventh Circuit, as the Ninth Circuit did here, carefully analyzed the differences between *Kodak* and the franchise cases, and explicitly held that "the instant case does not involve the *Kodak* issue of

---

[19] (Resp. App. 27-28, 31-33)

whether or not consumers can switch to a competitor." 302 F.3d at 1223. *Maris* rejected petitioners' claim of *per se* immunity, holding that "[c]ontracts, and the exercise of contract power, may run afoul of the antitrust laws, as evidenced by the fact that § 1 of the Sherman Act prohibits any '*contract*, combination . . . , or conspiracy in restraint of trade.'" 302 F.3d at 1219.

This review of the Second, Third, Fifth and Eleventh Circuit decisions cited by petitioners confirms that the Ninth Circuit's decision in this case is not in conflict with this line of cases, nor with the Ninth Circuit's own precedent in *Forsyth* and not a basis for the grant of certiorari.

D. Petitioners Misrepresent *Kodak* and Its Impact

Even petitioners' description of *Kodak*, is hyperbole. Their contention that *Kodak* "broke new ground by holding that an antitrust market can be defined in terms of a single company's products"[20] is simply not correct.[21] Petitioners' unsubstantiated claims that *Kodak* would "release a torrent of litigation and a

---

[20] Petition, page 14.

[21] *Kodak* held that: "Kodak also contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree. . . . This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market. [citations omitted]"

flood of commercial intimidation" or has "wasted untold amounts of litigation and judicial resources"[22] are also not accurate.[23]

Kodak principally stands for the well-recognized proposition that legal presumptions based on formalistic market theories – like the *per se* legality rule

---

[22] Petition, page 14.

[23] Neither the dissenting language from Justice Scalia in *Kodak* nor that cited from Professor Hovenkamp are objective measures of the real effect of *Kodak*. Justice Scalia, of course, was only predicting the future. Professor Hovenkamp was retained by Kodak and its counsel (IKON's present counsel) to advocate this position at the Ninth Circuit and in a certiorari petition in 1998, after a jury found Kodak liable for the alleged antitrust violations. *See*, Supreme Court No. 97-1298, 1998 WL 34103528. Objective sources, surveying actual cases reach conflicting conclusions. The article relied upon by petitioners actually concluded: "[a]fter thoroughly surveying the subsequent case law, we have found few cases in which the plaintiff has survived summary judgment involving Kodak-style lock-in claims. . . . The reality in the trenches is that federal district courts and federal courts of appeal have bent over backwards to construe *Kodak* as narrowly as possible. In our view, it can fairly be said that the Supreme Court decision in *Kodak* has been narrowed to the point where it is simply no longer an effective weapon for antitrust plaintiffs." Goldfine & Vorrasi, *The Fall of the* Kodak *Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 Antitrust L.J. 209, 210. *See, also* Lampert, *Antitrust in IP Licensing: Selected Concerns and Considerations*, SN 051 ALI-ABA 237 (2007): "Since *Kodak*, few reported decisions have found aftermarkets sufficiently constrained to support the concept that the manufacturer holds a "monopoly" in that market. *See generally* 1 ABA Antitrust Section, *Antitrust Law Developments* (5th Ed. 2002) at 566-573, gathering cases"; 1 ABA Antitrust Section, *Anitrust Law Developments* (6th Ed. 2007) at 588-593.

petitioners urge – must give way to the facts on the record in an antitrust case. *Id.* at 466-67. For the Court in *Kodak*, adopting the *per se* rule petitioners urged there was out of the question in light of the record evidence, just as the Ninth Circuit found IKON's and GE's *per se* rule was here.[24]

E. Newcal's Allegations of "Practical Indicia" Separating Its Derivative Relevant Markets from the Competitive Interbrand Market for Original Contracts

The Ninth Circuit found that Newcal's FAC sufficiently alleges that IKON customers constitute a submarket under *Brown Shoe*'s "'practical indicia' of an economically distinct submarket: 'industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Newcal's FAC clearly contains

---

[24] Kodak's economic theory – that the primary market disciplines aftermarkets so that monopolization in aftermarkets is not profitable and cannot occur – has also not withstood the test of time. MacKie-Mason, Metzler *Links Between Vertically Related Markets: Kodak* (1992), page 392, in *The Antitrust Revolution, Economics Competition and Policy* (3d Ed. 1999) ("Economists writing since the Supreme Court opinion, including at least one who testified for Kodak at trial, have mostly agreed that there are circumstances under which aftermarket monopolization can be profitable overall.").

extensive factual allegations showing that the requirements of this precedent was met.[25]

II. The RICO Issues

The Ninth Circuit opinion reversed the district court on three holdings under RICO, 18 U.S.C. § 1961 et seq. and remanded, all on narrow grounds.

(a) It reversed the district court's holding that Newcal had not sufficiently alleged it was "injured in its business or property" under 18 U.S.C. § 1964(c). It remanded this to the district court for "reconsideration of the compensable injury requirement under *Diaz* [*Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc)]" which was decided after the district court's ruling.

(b) It reversed the district court's holding that Newcal had not sufficiently alleged that its injury was the "proximate result of the alleged racketeering activity." It found that "proximate cause" involved "factual questions which we cannot resolve on a Rule 12(b)(6) motion in this case" and remanded to the district court for further consideration of the proximate cause requirement under the appropriate standard.

---

[25] (Resp. App. 9-10, 29-33)

(c) It reversed the district court's holding that Newcal had failed to allege a RICO enterprise. It did so based on the recent Ninth Circuit case on the "RICO enterprise" requirement, *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) on which this Court recently denied certiorari. *Microsoft Corp. v. Odom,* 128 S. Ct. 464, 169 L.Ed.2d 325 (Oct. 15, 2007) (No. 07-138).

Petitioners seek certiorari only on (b) and (c) the RICO "proximate cause" and "enterprise" requirements, apparently conceding that Newcal has sufficiently alleged injury to its "business or property," satisfying 18 U.S.C. § 1964(c).

Although petitioners, in their "Questions Presented" list only RICO's proximate-cause, and enterprise requirement, they raise repeatedly, both directly and by inference, the issue of "whether a civil RICO plaintiff alleging mail or wire fraud as predicate acts must prove that it detrimentally relied on misrepresentations the defendant directed at it, the plaintiff." (Petition, p. 27 n.11).[26] This issue, also argued by

---

[26] *See, also*: (a) Petition, page 10, lines 25-30, "[a]s the [district] court explained '[c]ourts regularly dismiss fraud-based RICO claims in which the alleged misrepresentations were directed at third parties rather than at the plaintiff,' and 'Newcal is not the proper party to assert this RICO claim' "; and (b) Petition, page 25, lines 11-13, "[t]he Court held [in *Anza*] that fraud-based claims could be brought only by the direct victim of the alleged fraud."

petitioners in the district court, has now been decided against petitioners by this Court in its unanimous opinion in *Bridge, et al. v. Phoenix Bond & Indemnity Co., et al.*, ___ U.S. ___, 128 S. Ct. 2131, 2008 WL 2329761 (June 9, 2008) (No. 07-210) ("*Bridge*"). *Bridge*, decided after petitioners filed their petition in this Court in May 2008, held: "a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations." 128 S. Ct. at 2145.

A. "Proximate Cause" Requirement Under RICO

1. "Proximate Cause" Standards in *Bridge*

This Court's well-reasoned opinion in *Bridge* teaches three things about RICO "proximate cause" relevant to the 9th Circuit's opinion. Each of these is antithetical to petitioners' position on proximate cause.[27]

---

[27] *Bridge* also, more generally, rejects the argument petitioners here make repeatedly, both as to the antitrust issues and RICO issues in this action: that plaintiffs' claims are nothing more than state court "common law disputes," "common law claims," and "ordinary common law actions" and should not be allowed as federal antitrust or RICO claims. This Court in *Bridge*, following *Sedima*, concluded: "'It is not for the judiciary

(Continued on following page)

(1) "Proximate cause . . . is a flexible concept that does not lend itself to "'a black-letter rule that will dictate the result in every case.'" 128 S. Ct. at 2142. Petitioners argue for a "black-letter rule" that a competitor may never sue its rival where the predicate mail fraud is against a third party customer and that this "proximate-cause standard requires courts to dismiss RICO claims in these circumstances *as a matter of law*."[28]

(2) "'[P]roximate cause' [is used] to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts,' *Holmes,* 503 U.S. at 268, with a particular emphasis on the 'demand for some direct relation between the injury asserted and the injurious conduct alleged'" 128 S. Ct. at 2142. Petitioners urge, contrary to this teaching, that the Ninth Circuit erred in remanding this issue to the district court to use the "judicial tools" set out in *Holmes* and *Anza* "for further consideration of the proximate cause requirement." Quite contrary to petitioners' contentions, the Ninth Circuit here was following the standards of this Court for determining "proximate cause."

(3) As in the common law, "proximate cause" under RICO "provides only that the plaintiff's loss must be a foreseeable result of *someone's* reliance on

---

to eliminate the private action in situations where Congress has provided it.'" 128 S. Ct. at 2145

[28] Petition, page 24, lines 19-20.

the misrepresentation" and there is a "long line of cases in which courts have permitted a plaintiff directly injured by a fraudulent misrepresentation to recover even though it was a third party and not the plaintiff, who relied on the defendant's misrepresentation." 128 S. Ct. at 2143. In an intentional tort, as here, where (a) IKON's and GE's "flex" fraud specifically targeted a plaintiff[29] and (b) the fraud was the "but for" cause of actual injury to the targeted plaintiff, proximate cause is presumed. This is true both under common law specifically dealing with intentional torts,[30] and under

---

[29] IKON's Flex Training Manual stated that the intent of its fraudulently obtained contract extensions was to "create[ ] separation [of the customer] **from the competition** at the end of the original Agreement term" and to make it "virtually impossible **for the competition** to penetrate [the customer's] account." Resp. App. 17, 28-29.

[30] *See Restatement (Second) of Torts* (1979) § 870, "Liability For Intended Consequences – General Principle. One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability"; and, § 435A "Intended Consequences. A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable . . . "; *Seidel v. Greenberg*, 108 N.J.Super. 248, 261-269, 260 A.2d 863, 871-876 (1969); *Derosier v. New England Tel. & Tel. Co.*, 81 N.H. 451, 464, 130 A. 145, 152 (1925) ("For an intended injury the law is astute to discover even very remote causation.").

the traditional analysis of proximate cause set out in *Palsgraf*.[31]

2. Attenuated Causation in *Anza v. Ideal Steel Supply Co.*

What petitioners are really trying to argue in their petition is that the causation facts in this case are on all fours with those in *Anza*, thus requiring a dismissal of all of Newcal's claims "*as a matter of law*" for lack of "probable cause." This argument is not even close to correct. (1) In *Anza* there was no evidence that National Steel targeted its RICO activity at Ideal Steel, like IKON and GE targeted their RICO activity directly at "competitors." In fact, in *Anza*, the RICO activity was targeted solely at the State of New York. (2) The type of injury alleged under 18 U.S.C. § 1962(c)[32] in *Anza*, lost sales by its competitor Ideal,

---

[31] Chief Justice Cardozo in his classic discussion of "proximate cause" in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, 100-01 (1928) concedes that the plaintiff there could recover for "intentional invasion of her bodily security." *Id.*, at 341. And, that only [i]f the harm was not wilful" do the theories and policies of proximate cause come into play. This is true Cardozo, holds, since under the common law there was no concept of "negligence" and recovery for injury to person or property was through "trespass" which "did not lie in the absence of aggression, and that [aggression had to be] direct and personal." "Negligence" and "proximate cause" developed later in the common law as "trespass on the case." *Id.*, at 345-346.

[32] The Court in *Anza* did not address Ideal's claim under 18 U.S.C. § 1962(a) for use or investment of RICO proceeds, but remanded this for the Second Circuit to "determine whether

(Continued on following page)

was several steps of causation removed from the fraud on the State of New York – without sufficient allegations of causative linkage. (3) The RICO activity caused direct monetary damage only to the State of New York, whereas here there are very specific allegations that Newcal paid monies to IKON and GE resulting directly from of the actual RICO predicate acts.

3. The Ninth Circuit Opinion Is Not in Conflict With the Seventh Circuit Decision in *Israel Travel*

Petitioners cite the Seventh Circuit case in *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995), which they relied on in the Ninth Circuit, as creating a circuit conflict on "proximate cause" with the Ninth Circuit.[33] The *Israel Travel* case involved claims that one of two rival travel agencies that competed for tours to Israel engaged in mail fraud by misrepresentations to customers that defamed its business rival, giving rise to RICO claims by the rival.

First, the Seventh Circuit in *Israel Travel accepted* the ruling in of the Fourth Circuit in *Mid*

---

petitioners' alleged violation of § 1962(a) proximately caused the injuries Ideal asserts."

[33] Petition, pages 26-27.

Atlantic Telecom,[34] that RICO reaches business rivals where damage is also done to customers. There is no conflict with the Ninth Circuit as to this holding of the Seventh Circuit – both of which contradict petitioners' claim that business rivals cannot sue under RICO where the RICO predicate offenses influence customers and derivatively injure rivals.

Second, however, the Seventh Circuit in *Israel Travel*, found that the mail fraud statute, 18 U.S.C. § 1341, "does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO."

This holding by *Israel Travel* was overturned by *Bridge*. This Court in *Bridge* rejected the argument that 18 U.S.C. § 1341 required a RICO plaintiff to have relied on the fraudulent misrepresentations constituting the indictable predicate act of mail fraud and rejected the *Bridge* petitioners' claims that "rival businesses would have no cause of action under RICO . . . even though they were the primary and intended victims of the scheme to defraud." *Bridge*, using the *Israel Travel* facts, stated:

> Or, to take another example, suppose an enterprise that wants to get rid of rival businesses mails misrepresentations about them

---

[34] *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.* 18 F.3d 260 (4th Cir. 1994).

> to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business "by reason" of a pattern of mail fraud, even though they never received, and therefore never relied on the fraudulent mailings.

128 S. Ct. at 2139.

Newcal and other respondents, as competitors of IKON and GE, were intended victims of the fraudulent "flexing" practices and "lose money as a result of the misrepresentations" to IKON and GE customers. "[T]hey . . . were injured in their business 'by reason' of a pattern of mail fraud, even though they never received and therefore never relied on the fraudulent mailings." *Id.*

4. "Judicial Tools" for Determination of "Proximate Cause" of *Anza* and *Bridge* Were Correctly Applied by the Ninth Circuit

The Ninth Circuit, in addressing "whether a plaintiff has shown proximate cause" as required by RICO, used the three factors that this Court employed in *Anza* and *Bridge*, which were derived from *Holmes*: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's

wrongful conduct; and (3) whether the courts will have to adopt complicated rules for apportioning damages to obviate the risk of multiple recoveries. 513 F.3d 1056. *See, Anza*, 547 U.S. at 459-460; *Bridge,* 128 S. Ct. at 2142. It remanded for consideration of these factors based on the facts of this case. The Ninth Circuit's limited holding on proximate cause is directly in step with this Court and unremarkable.

B. "Associated-in-Fact Enterprise" Requirement Under RICO

The Ninth Circuit opinion, in reversing the district court's dismissal of the RICO claim for failure to allege a RICO enterprise, relied on its recent *en banc* decision in *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007). This Court, in its October 2007 Term, denied certiorari on this very issue. *Microsoft Corp. v. Odom,* 128 S. Ct. 464, 169 L.Ed.2d 325 (Oct. 15, 2007) (No. 07-138).

All of the reasons for denying certiorari in *Odom* apply with equal force here. Other reasons also apply. (a) The Ninth Circuit's discussion and holding on the RICO "associated-in-fact enterprise" requirement here consisted of only four sentences and is merely derivative of the *en banc* decision in *Odom*. (b) The Ninth Circuit did not address the extensive allegations of the RICO Statement filed as Exhibit C to the FAC which were submitted to satisfy, and do satisfy the strictest "associated-in-fact enterprise" standard which the Ninth Circuit had until *Odom* was decided in 2007.

Resolving the circuit split in favor of the strict standard would not change the outcome in this case. (c) The issue here is only one of four posited by petitioners for granting certiorari, whereas it was the sole issue in *Odom*.

It would, therefore, make little sense to use the holding here as a vehicle to decide this RICO requirement after denying certiorari in *Odom*.

1. The Circuit Split Over the Degree of Structure an Associated-in-Fact RICO "Enterprise" Requires Is Decades Old, With No Action by Congress or This Court and No Ill-Effects

The circuit split on the degree of structure required for a RICO enterprise has existed since the 1980's.[35] At the time *Odom* was decided by the Ninth Circuit in 2007, five circuits, including the Ninth Circuit, required an "ascertainable separate structure" for an associated-in-fact RICO enterprise.[36] One

---

[35] Compare *United States v. Weinstein*, 762 F.2d 1522, 1537 n. 13 (11th Cir. 1985) (stating that 11th Circuit cases "have repeatedly rejected" the contention that "a RICO enterprise must possess an 'ascertainable structure' distinct from the associations necessary to conduct the pattern of racketeering activity"), *modified, reh'g denied in part*, 778 F.2d 673 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986), with *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.) ("[I]t is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses."), *cert. denied*, 464 U.S. 849 (1983).

[36] The Third, Fourth, Eighth, Ninth and Tenth Circuits.

circuit, the Seventh Circuit required "some" kind of ascertainable structure, although not a "separate" structure. Four circuits at that time rejected any requirement that there be an "ascertainable structure" for an associated-in-fact RICO enterprise.[37] 486 F.3d at 549-550. As petitioners point out, the Seventh Circuit in 2008 adopted the stricter standard of requiring an ascertainable separate structure for an associated-in-fact RICO enterprise.[38] The circuit split is now five to five on this issue.

Although this split has existed for over twenty years, with the debate over interpretation of the statutory language establishing an "associated-in-fact" RICO enterprise[39] still active,[40] Congress has not acted to amend the statute. Nor has this Court sought to revisit *Turkette* and its progeny, on which the Ninth Circuit relied to reach its conclusion that

---

[37] The First, Second, Eleventh and District of Columbia Circuits.

[38] *Limestone Development Corp. v. Village of Lemont, Ill.*, 520 F.3d 797 (7th Cir. 2008)

[39] The definition of "enterprise" in the text of RICO, in its entirety, reads: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not an legal entity." 18 U.S.C. § 1964(c).

[40] Judge Posner, in a terse analysis in the 2008 *Limestone Development* case asserts that the statutory language dictates requirement of a separate ascertainable structure. The Ninth Circuit in *Odom*, defining the dispute more broadly ("what is disputed is the manner in which a group must be associated") and exploring in depth this Court's decisions bearing on this language and interpretation of RICO reached the opposite conclusion.

there is no separate structure requirement. Petitioners do not cite authority nor attempt to make the case that the circuit split on this issue has led to unreasonable litigation under RICO, forum shopping or other problems in the courts. In fact, this Court long ago dismissed the concern that a broad reading of RICO was unwarranted ("RICO is to be read broadly") and held that correction, if it is to occur "must lie with Congress." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-99, 105 S. Ct. 3275, 87 L.Ed.2d 346 (1985).

2. *Odom*, on Which the Ninth Circuit Relied, Was Properly Decided under This Court's Precedent in *Turkette*

In *Odom* a diverse *en banc* panel of fifteen judges reached a unanimous consensus that the district court's dismissal of plaintiffs' RICO claim for failure to allege properly an associated-in-fact enterprise should be reversed. Ten judges, including the author of the Ninth Circuit opinion here, "join[ed] the circuits that hold that an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." They held:

> In *Turkette*, the Supreme Court carefully articulated the criteria for an associated-in-fact enterprise under RICO. We do not believe that we are at liberty to add to them. Applying the criteria articulated in *Turkette*, we conclude that plaintiffs have sufficiently alleged an associated-in-fact enterprise.

486 F.3d at 553. The remaining five judges disagreed and sided with the prior law of the Ninth Circuit requiring an ascertainable separate structure for an associated-in-fact RICO enterprise.[41]

The criteria of this Court for an associated-in-fact enterprise under RICO in *Turkette*, adopted by *Odom*, were: (a) "a group of persons associated together for a common purpose of engaging in a course of conduct"; (b) "'evidence of an ongoing organization, formal or informal'"; and (c) "'evidence that the various associates function as a continuing unit.'" 486 F.3d at 553. The separate-structure requirement of the conflicting circuits as urged by petitioners here is nowhere to be found in *Turkette*.

This Court in five (5) significant RICO decisions since *Turkette* has consistently followed its lead in not construing RICO narrowly – as petitioners here urge it to do. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L.Ed.2d 195 (1989); *Sedima*; *Scheidler*; *Kushner*; *and Bridge*. It would be inconsistent for the Court to grant certiorari to break from this string of precedents.

Requiring a separate organizational structure for an associated-in-fact RICO enterprise akin to recognized legal entities, as suggested by petitioners and

---

[41] *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996). This case, and two other Ninth Circuit cases, to the extent that they required any particular organizational structure, separate or otherwise, for an associated-in-fact RICO enterprise, were expressly overruled.

the Seventh Circuit on which they rely[42] would create an anomalous result and turn RICO on its head – preventing prosecution of large scale criminal operations where the entire structure was engaged in the RICO enterprise and preventing prosecution of groups of criminals who had a loose association without corporate-like enterprises.

3. Newcal's RICO Statement Satisfies The Stricter Standards of RICO Associated-in-Fact Enterprise Structure of Other Circuits

When this case was before the district court, Ninth Circuit precedent required a separate organizational structure for an associated-in-fact RICO enterprise.[43] Newcal, as requested by the district court, filed a detailed RICO Statement which was incorporated into the FAC as Exhibit C. In this RICO Statement Newcal satisfies the separate structure requirement. It alleges a separate structure from the RICO scheme, and the mechanism for decision making and for controlling and directing the affairs of the

---

[42] Judge Posner suggests that such a structure might include: "a system of governance, an administrative hierarchy, a joint planning committee, a board, a manager, a staff, headquarters, personnel having differentiated functions, a budget, records or . . . other indicator of a legal enterprise."

[43] *See, Wagh v. Metris Direct, Inc.*, 348 F.3d 1102 (9th Cir. 2003); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073 (9th Cir. 2000) and *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996).

enterprise on an ongoing basis, continuity of structure and personnel, a common and shared purpose, and central administrative functions.[44] These allegations meet even the stricter RICO enterprise standards. If certiorari were granted and the current Third, Fourth, Seventh, Eighth and Tenth Circuit standards were adopted by this Court, the outcome in this case would not change.

III. The Declaratory Judgment Claim

The Ninth Circuit opinion, in reversing the district court's dismissal of Newcal's declaratory relief claim for lack of constitutional standing under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* ("Act"), did so on narrow and unremarkable grounds.

IKON had threatened in writing to sue Newcal for interference with its existing and potential business relationships under IKON contracts, which Newcal believed were not legally protectable.[45] Newcal sought a judicial declaration on the validity of the contracts at

---

[44] (Resp. App. 131-135)

[45] The allegation in the original complaint was as follows. "IKON, on June 18, 2004, by letter from its attorneys, threatened NewCal with 'legal action' over NewCal's position in this action. The letter claimed that IKON's "Image Management Plus Flex Program" and other practices alleged in this action were "legitimate business practices," and that NewCal was 'interfering with its [IKON's] existing and potential business relationships,' including relationships with customers pursuant to contracts for which a declaratory judgment is sought in this action."

issue. While Newcal was not a party to the contracts, it had standing under the language of the Act and case law to bring the suit for a declaration of its legal rights.

The Ninth Circuit found that: "Newcal had a stake in the controversy even though it was not a party to the relevant contracts," and that the Ninth Circuit had "held under similar circumstances that the threat of suit is enough to create standing, such that the threatened party may seek a declaration that the threatening party's putative rights are invalid." This holding is well-supported in Ninth Circuit as well as Eleventh Circuit precedent.[46]

Petitioners' claim, that this holding of the Ninth Circuit creates a circuit conflict with a thirty-nine-year-old and rarely-cited Seventh Circuit case[47] that this split is one worthy of granting certiorari, is far fetched. The Seventh Circuit case, involving an insured and its two insurance companies litigating

---

[46] *Societe de Conditionnement en Aluminium v. Hunter Engineering Co.*, 655 F.2d 938 (9th Cir. 1981) (declaratory relief for plaintiff where threat of patent infringement litigation was made by defendant to third party potential customer of plaintiff); *National Basketball Association v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987) (declaratory relief for plaintiff where threat of antitrust litigation was made by defendant); *GTE Directories Publishing Corporation v. Trimen America, Inc.*, 67 F.3d 1563 (11th Cir. 1995) (declaratory relief for plaintiff not in privity with defendant where defendant claimed contacting defendants' customers would constitute tortious interference).

[47] *Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F.2d 707, 710 (7th Cir. 1969).

liability for a boiler explosion, simply held little more than that all three were proper parties to the suit under the Act. 416 F.2d at 710.

Nor does petitioners' claim that the Act cannot be employed unless all parties potentially affected by the judgment are before the court (under Rule 23 if necessary) have merit. The statutory language, refutes this, allowing "[i]n a case of actual controversy . . . any court of the United States, upon the filing of an appropriate pleading, [to] declare the rights and other legal relations of *any interested party* seeking such declaration, *whether or not further relief is or could be sought.*" 28 U.S.C. § 2201 (emphasis supplied). The simple fact that a declaration of the rights of non-litigants may be affected by collateral estoppel in a later proceeding does not require that they be joined in every suit where this possibility is present. It is common place for a single party to bring a suit under the Act for a declaration of its rights where the outcome may affect the rights of non-parties.[48]

---

[48] This Court in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764, 166 L.Ed.2d 604 (2007) reviewed cases seeking declaratory relief, both under the Act and not. In several, declarations were sought by individuals, where a judgment they might obtain would affect the rights of many (who were not joined under Rule 23) through collateral estoppel. *See, Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15, 68 L.Ed. 255 (1923) (individual challenging Washington's anti-alien land law); and *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974) (individual challenging Georgia trespass statute).

CONCLUSION

IKON's and GE's petition for a writ of certiorari should be denied.

Petitioners purport to raise multiple and diverse issues, both factual and legal. These involve diverse antitrust, RICO and declaratory relief questions. They urge that established rules be applied that don't fit the facts (franchise antitrust cases and RICO proximate cause cases), or, that sweeping new rules be fashioned (abrogation of *Kodak* for *per se* legality and Rule 23 trumping the Declaratory Judgment Act.) They claim circuit conflicts on the law. Most do not exist. One that is present has existed for over two decades, without Congress or this Court acting to resolve it. They would have the Court, in this fact-specific case, with extensive and detailed allegations on the record, ignore these facts (which petitioners largely have) and decide all of these issues in their favor under Rule 12(b)(6), as a matter of law.

On the antitrust issue – defining a relevant product market and assessing market power in that market – petitioners want the Court to abandon the classic market criteria of *du Pont* and *Brown Shoe*, which was used by respondents in their complaint and in the Ninth Circuit opinion. They urge adoption of a ***per se*** *legality* rule that if a group of buyers of a product have all contracted with an alleged Sherman Act defendant, the antitrust laws simply do not apply. As *Kodak* held, such *per se* rules are disfavored. Legal presumptions based on formalistic market theories

must give way to the facts on the record in an antitrust case.[49] Petitioners' invitation for this court to establish a *per se* rule of legality and ignore the facts should be declined.

The Ninth Circuit decision here is not in conflict with the decisions in the Second, Third, Fifth and Eleventh Circuits. The Ninth Circuit opinion reaffirmed the Ninth Circuit holding in *Forsyth* which follows the franchise holdings petitioners cite from these other circuits. Because of the significant differences in the facts of this case from the alleged conflicting cases in the other circuits, it is unlikely that this case would be decided differently in those circuits.

On the two RICO issues raised by petitioners, neither is even close to suitable for the grant of certiorari in this case.

Petitioners, in trying to fit this case into the *Holmes* and *Anza* molds, where proximate cause under RICO was found not to exist, grossly distort the facts alleged by Newcal. Their claims that this case simply alleges "that the defendant's aim was to increase market share at a competitor's expense,"[50] and "that a corporate rival defrauded its customers into extending their contracts at the purported expense of

---

[49] 504 U.S. at 466-467.

[50] Petition, page 3, lines 24-26.

the plaintiff's commercial ambitions"[51] are not true. (1) Newcal, unlike the SIPC in *Holmes* and Ideal Steel Supply in *Anza,* was specifically targeted, in writing, by the RICO scheme which was not just designed to defraud customers generally. (2) Newcal and other plaintiffs paid monies directly to IKON and GE, as a direct result of the RICO scheme.

As this Court unanimously held in *Bridge,* proximate cause under RICO "is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case'" and (quoting *Holmes*) under RICO" we use[d] 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." The Court should reject petitioners' attempt to short circuit this factual inquiry here and to "dismiss RICO claims in these circumstances *as a matter of law.*"[52]

This Court denied certiorari in *Odom* on the issue of a RICO associated-in-fact enterprise. This case is a less appropriate candidate for certiorari than *Odom* because it relied on that case without discussion and because Newcal's FAC, pled under the stricter standard of *Wagh*, *Simon* and *Chang* which were overruled by *Odom*, meets the stricter standard urged by petitioners.

---

[51] Petition, page 24, lines 7-9.

[52] Petition, page 24, lines 23-24.

Petitioners' claim that any declaratory judgment action where collateral estoppel might affect a large number of non-parties is required to be brought as a class action under Rule 23 is unprecedented. They have provided no precedent for this and there is considerable precedent against it. This issue is simply not worthy of a grant of certiorari.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MAXWELL M. BLECHER
JAMES R. NOBLIN
BLECHER & COLLINS
515 South Figueroa Street,
17th Floor
Los Angeles, California
90071-3334
(213) 422-6222

JAMES A. HENNEFER
Counsel of Record
HENNEFER, FINLEY &
WOOD, LLP
425 California Street,
19th Floor
San Francisco, California
94104
(415) 421-6100

AUGUST 2008

No. 07-1501

In The Supreme Court of the United States

IKON OFFICE SOLUTIONS, INC.; and
GENERAL ELECTRIC CAPITAL CORPORATION,

Petitioners,

v.

NEWCAL INDUSTRIES, INC.; CPO, LTD.;
PINNACLE DOCUMENT SYSTEMS, INC.;
PACIFIC OFFICE AUTOMATION, INC.;
and KEARNS BUSINESS SOLUTIONS, INC.;

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' APPENDIX

Maxwell M. Blecher, Esq. (SBN 026202)
James Robert Noblin, Esq. (SBN 114442)
BLECHER & COLLINS, P.C.
611 West Sixth Street, 20th Floor
Los Angeles, CA 90017
Telephone: (213) 622-4222
Facsimile: (213) 689 1944

James A. Hennefer (SBN 059490)
HENNEFER & WOOD
425 California Street, 19th Floor
San Francisco, CA 94104-2296
Telephone: (415) 421-6100
Facsimile: (415) 421-1815

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NEWCAL INDUSTRIES, INC., a California Corporation; CPO, LTD., a California Corporation; PINNACLE DOCUMENT SYSTEMS, INC., a California Corporation; PACIFIC OFFICE AUTOMATION, INC., an Oregon Corporation; and KEARNS BUSINESS SOLUTIONS, INC., a South Carolina Corporation, Plaintiffs	CIVIL NO. C 04-2776 FMS **FIRST AMENDED COMPLAINT** (1) Sherman Act (15 U.S.C. §§ 1 and 2) (2) Lanham Act (15 U.S.C. §1125(a)(1)(B)) (3) RICO (18 U.S.C. §§ 1961(c), (d), *et. seq.*)

vs.

IKON OFFICE SOLUTIONS, INC., an Ohio Corporation; and GENERAL ELECTRIC CAPITAL CORPORATION, a Delaware Corporation,

Defendants

DEMAND FOR JURY TRIAL

[ii] **Table of Contents**

I. Nature of this Action 1

A. Overview 1

B. IKON Contracts 1

C. IKON Amendments; Flexed IKON Contracts 2

D. Fraudulent IKON Intent 2

E. "Unfair Business Practices" and "Market Imperfections" 3

F. GE Joined IKON and IOS In Fraudulent and Anticompetitive Actions 5

G. No "Interchangeability of Products" or "Cross-Elasticity of Demand" 6

H. Relevant Markets 7

I. Foreclosure of Competition and Injury to Consumers 7

J. Statutory Bases for Action 8

II. Jurisdiction, Venue and Commerce 9

III. The Parties 9
A. Plaintiffs 9
B. Defendants 11
C. Defendants' Predecessor: IOS Capital, LLC 12
IV. The Relevant Markets 13
A. Product Markets 13
B. Geographic Markets 13
C. Description of Markets 13
1. Relevant Market for Replacement Copier Equipment for IKON and GE Customers with Flexed IKON Contracts 13
2. Relevant Market for Copier Service for IKON and GE customers with Flexed IKON Contracts 14
3. Practical Indicia of the Relevant Markets 15
V. The Unlawful and Anticompetitive Conduct of IKON and IOS Capital 18
A. Background 18
[iii] B. Original IKON Contracts 20
C. Amending the Original IKON Contract – "Flexing" 21
1. The IKON Amendment Form 22
2. Direct Deception of Customers 23
D. Additional Unfair and Anticompetitive Actions of IKON and GE 27

VI. Claims for Relief 31

A. *First Claim for Relief*
(Against IKON and GE)
Unreasonable Restraints of Trade
(Section 1 of the Sherman Act,
15 U.S.C. § 1) 31

B. *Second Claim for Relief*
(Against IKON and GE)
Exclusive Dealing Arrangements
(Section 1 of the Sherman Act,
15 U.S.C. § 1) 34

C. *Third Claim for Relief*
Per Se Tying
(Against IKON and GE)
(Section 1 of the Sherman Act,
15 U.S.C. § 1) 36

D. *Fourth Claim for Relief*
(Against IKON and GE)
Rule of Reason Tying
(Section 1 of the Sherman Act,
15 U.S.C. § 1) 38

E. *Fifth Claim for Relief*
(Against IKON and GE)
Monopolization
(Section 2 of the Sherman Act,
15 U.S.C. § 2) 38

F. *Sixth Claim for Relief*
(Against IKON and GE)
Attempted Monopolization
(Section 2 of the Sherman Act,
15 U.S.C. § 2) 40

G. *Seventh Claim for Relief*
(Against IKON and GE)
Unfair Competition
(Section 43(a) of the Lanham Act, 15
U.S.C. § 1125(a)(1)(A), (B)..... 41

H. *Eighth Claim for Relief*
(Against IKON and GE)
R.I.C.O.
(18 U.S.C. § 1961(c) and (d), et. seq)..... 42

[iv] VIII. *Prayer for Relief* 54

DEMAND FOR JURY TRIAL..... 56

Exhibit A

Exhibit B

Exhibit C

[1] COME NOW plaintiffs NEWCAL INDUSTRIES, INC. ("NewCal"), CPO LTD. ("CPO"), PINNACLE DOCUMENT SYSTEMS, INC. ("Pinnacle") PACIFIC OFFICE AUTOMATION, INC. ("POA"), and KEARNS BUSINESS SOLUTIONS, INC. ("Kearns"), by and through their undersigned counsel, and, demanding a jury trial as to all issues triable by a jury, allege and state their complaint against defendants IKON Office Solutions, Inc. ("IKON") and against General Electric Capital Corporation, operating by and through its wholly owned subsidiary, GE Commercial Finance and doing business as IKON Financial Services™ ("GE"), as follows:

I. Nature of this Action

A. Overview

1. This is an action against defendants IKON and GE for fraudulent and anticompetitive business practices described in detail below. These practices were used nationwide by IKON, by GE and by IKON's former 100% owned subsidiary, IOS Capital, LLC ("IOS Capital"). IOS Capital was acquired by GE in March 2004. The practices center around IKON fraudulently extending office equipment leases – known as "flexing" such leases – and around IOS Capital and GE fraudulently enforcing these extended leases.

2. Both IKON and GE, as a result of these business practices: (a) obtained exorbitant lease payments, lease "buy-outs" and lease-end payments from customers and from plaintiffs; (b) foreclosed and monopolized relevant markets from competitive alternatives provided by plaintiffs and other competitors; (c) obtained supracompetitive prices from and price discriminated against customers in those relevant markets; and (d) avoided compliance with many state and federal laws.

B. IKON Contracts

3. IKON, IOS Capital and GE (d/b/a IKON Financial Services™) sold, financed and administered lease/rental contracts for office equipment ("IKON Contracts"). These IKON Contracts were for copiers, printers and facsimile equipment and for related

servers, network equipment, accessories and software ("Copier Equipment").

4. The IKON Contracts provide businesses with equipment financing for their Copier [2] Equipment. The financing is bundled with supplies, parts and service ("Copier Service"). The IKON Contracts are for fixed periods, typically for five (5) years. The IKON Contracts themselves are often obtained under false pretenses – principally by selling the contracts on their alleged flexibility, without disclosing IKON's purpose and intent to fraudulently exact, as a price for any change in the contract, a lengthy extension of all IKON equipment under contract with the customer.

C. IKON Amendments; Flexed IKON Contracts

5. After obtaining the IKON Contract, IKON fraudulently obtained one or more "amendments" or "addenda" to the IKON Contracts ("IKON Amendments") from a very large percentage of its customers. These IKON Amendments, also known as "flexes," extended IKON Contracts well beyond their original term ("Flexed IKON Contracts").

D. Fraudulent IKON Intent

6. IKON intended and knew its business practices to be fraudulent. It knew that they were designed to "con" their customers. IKON designed the

IKON Amendment forms to conceal their purpose and claimed legal effect. IKON trained its sales persons when "flexing" a customer not to disclose to the customer that IKON would claim an extension of the IKON Contract for each Amendment. IKON refused the requests of its own employees to include standardized written disclosures to the customers about the Amendment. IKON trained its sales persons how to engage in active deception of customers.

7. IKON personnel sang, out of the hearing of customers, the following ditty about their business practices, to the tune of "Nick Nack Paddy Wack Give the Dog a Bone (This Old Man Goes Rolling Home)."

"I con you;

You con me;

We con customers daily;

With a flex 'em in;

And a flex 'em out;

And cost per copies all about."

[3] 8. The "cons" were successful. IKON and GE (which bought Flexed IKON Contracts at a substantial discount) demanded and obtained exorbitant buyouts at amounts as high as fifty (50) times the equipment's market value. IKON customers were foreclosed from competition and fraudulently locked-in to extended contracts if they did not pay the buyouts. IKON and GE leveraged the Flexed IKON

Contracts into new supracompetitively priced contracts.

E. "Unfair Business Practices" and "Market Imperfections"

9. IKON and IOS Capital have used (a) market imperfections unique to Copier Equipment, Copier Service and cost-per-copy contracts ("Market Imperfections"); and (b) fraudulent and anticompetitive acts and practices ("Unfair Business Practices") to accomplish their goals and to damage plaintiffs and consumers. They have used these to: (a) obtain Flexed IKON Contracts; (b) obtain additional IKON Contracts and IKON Amendments at inflated prices; (c) enforce Flexed IKON Contracts: (d) prevent competition; and (e) grossly overcharge consumers for Copier Equipment and Service. IKON and IOS Capital have been able, by use of their Market Imperfections, Unfair Business Practices and Flexed IKON Contracts, to prevent reasonable interchangeability and cross-elasticity of demand for competitors' products, to obtain supracompetitive prices from and to price discriminate against IKON customers with Flexed IKON Contracts for Copier Equipment and Service.

10. These fraudulent and anticompetitive acts and practices have affected and foreclosed a substantial share of the larger relevant market for Copier Equipment (exceeding 20%) and the relevant market for Canon and Ricoh brands of Copier Service (exceeding 40%), as well as virtually all of the relevant

markets (exceeding 80%) for replacement Copier Equipment for IKON customers with Flexed IKON Contracts and for Copier Service for IKON customers with Flexed IKON Contracts.

11. The "Market Imperfections" used to preclude competition include the following. (a) IKON and IOS Capital employed almost exclusively cost-per-copy contracts, bundling together Copier Equipment and Copier Service payments. (b) These cost-per-copy contracts prevent any possibility of life-cycle costing the Copier Equipment. (c) IKON and IOS Capital's Unfair Business Practices were concealed from their customers and not a part of any of their buying [4] calculus. (d) IKON and IOS Capital's Unfair Business Practices were not known by customers at all and not generally known in the industry. (e) Copier Equipment loses 90% of its residual value over its first five (5) years. (f) Markets for used copier equipment do not function efficiently and actual residual market values are low. (g) Most Copier Equipment is acquired through financing. (h) Industry practices limit the ability to finance large "buy outs" of equipment and unused service. (i) It is not practicable to buy out a cost-per-copy copier contract until it is 70% elapsed, even without it being "flexed." (j) Profits on the placement of Copier Equipment are small compared to the profits on the service. (k) The lead times and costs to switch vendors for Copier Equipment and Copier Service are high.

12. The "Unfair Business Practices" used to get consumers into Flexed IKON Contracts include:

(a) using deceptive forms for the IKON Amendments, in which forms prior explanatory language warning of the extensions has been intentionally omitted to deceive the consumer; (b) intentionally concealing and misrepresenting to the consumer the purpose of the IKON Amendments and the meaning of their terms; (c) using various "pretexts" like a "free trial" or swapping out poor-performing equipment in order to get IKON Amendments signed; (d) refusing to break out payments for each machine; (d) concealing from the customer and refusing to break out equipment payments and service payments; and (e) using the leverage of prior fraudulently obtained IKON Contracts or Amendments and collection threats to force the consumer into signing new IKON Contracts or Amendments.

13. "Unfair Business Practices" were applied not only to obtain Flexed IKON Contracts, but also by IKON and IOS Capital to enforce such contracts after they were obtained. After the Flexed IKON Contracts were obtained, additional Unfair Business Practices were used to prevent IKON customers from attempting to switch to Copier Equipment or Copier Service of competitors; to prevent them from challenging unlawfully obtained IKON Contracts and Flexed IKON Contracts; and to prevent them from challenging exorbitant "buy-out" or "lease end" payment demands.

14. The Unfair Business Practices applied by IKON and IOS Capital, after Flexed IKON Contracts

were obtained, involve an array of additional fraudulent and anticompetitive [5] practices. These included: (a) delays in producing, and refusals to produce the IKON Contracts or IKON Amendments (of which the customers were often deprived at the time of signing); (b) refusals to give "buy out" amounts, to substantiate them or to break them down; (c) denial of responsibility or the shifting of responsibility between IKON and IOS Capital for problems with contracts, buy-outs, service or billing, depending on whom the customer was dealing with at the time; (d) continued billing (with penalties) for unlawful charges; (e) cut-off of service to the subject equipment or equipment under different contracts from those in dispute; (f) making false adverse credit reports against the customer; (g) employing outside legal counsel to threaten or sue the customer without regard to the merits of such suit; (h) refusing to take back equipment as to which a contract was lawfully terminated – requiring the customer to leave it in place or to store it; (i) quoting unreasonable rigging and transport charges; and (j) threatening or billing additional large lease-end charges.

F. GE Joined IKON and IOS In Fraudulent and Anticompetitive Actions

15. IOS Capital was merged into IKON, effective March 30, 2004. Defendant GE acquired assets and liabilities of IOS Capital from IKON, effective March 31, 2004. GE bought IKON Contracts and IKON Amendments, many of which were fraudulently

obtained by IKON and IOS Capital from their customers and were being unlawfully enforced by IKON and IOS Capital. GE also acquired IOS Capital's lease administration facility and employees in Macon, Georgia. This facility which employed the Unfair Business Practices, Market Imperfections and Flexed IKON Agreements under IKON and IOS Capital has continued such unlawful activity under GE.

16. GE, with full knowledge that IKON Contracts and IKON Amendments were fraudulently obtained and that IOS Capital's practices in enforcing them were fraudulent and anticompetitive, has actively continued these practices. GE has contracted with IKON both to hold title to and to administer IKON Contracts and IKON Amendments which GE bought, as well as those of IKON held title to. GE has contracted, combined and conspired with IKON to carry out IKON's fraudulent and anticompetitive schemes, including use of all of IKON's and IOS Capital's Unfair Business Practices, Market Imperfections, Flexed IKON Contracts and other fraudulent and anticompetitive actions alleged herein.

[6] 17. GE, d/b/a "IKON Financial Services™," has, since buying $1.9 billion in IKON Contracts and Flexed IKON Contracts and since taking over IOS Capital's facility in Macon, Georgia, independently and with the assistance of IKON, procured new IKON Amendments and Flexed IKON Contracts. These were procured by using the fraudulently obtained IKON Contracts and IKON Amendments, the Market Imperfections and the Unfair Business Practices

alleged herein. GE has also procured exorbitant cash "buy-outs" from plaintiffs and consumers by these means.

G. No "Interchangeability of Products" or "Cross-Elasticity of Demand"

18. The practical effects of the Market Imperfections, Unfair Business Practices and Flexed IKON Contracts employed by IKON and GE have been and are to: (a) allow IKON and GE to claim and obtain payments for Copier Equipment after payment of the original fully-amortized value of the equipment, beyond amounts the customer intended or agreed to pay and greatly in excess of its fair market value; (b) force the customer into entering into new contracts or amendments with IKON or GE at supracompetitive prices, which prices discriminate against such customers; (c) allow IKON and GE to claim and obtain exorbitant "buy-out" payments for termination of Flexed IKON Contracts; (d) allow IKON and GE to claim and obtain an array of exorbitant "lease-end" payments; and (e) unreasonably foreclose competition for replacement Copier Equipment and Service for customers subject to Flexed IKON Contracts.

19. The exorbitant "buy-out" and "lease-end" payments demanded by IKON and GE are unsupported by the terms of the IKON Contracts, the Flexed IKON Contracts or applicable law. The "buy-out" and "lease-end" demands from consumers with Flexed IKON Contracts include, but are not limited

to: (a) payments for purchase of the equipment far beyond the fully amortized value and in excess of the fair market residual value; (b) gross payments for unused supplies, parts and service for the unlawfully extended term; (c) payments for storage or rigging and shipping of the equipment; and (d) payments for phantom equipment damage, missing parts or accessories, late fees, taxes, insurance or other "services."

[7] **H. Relevant Markets**

20. The principal relevant markets, in which IKON and GE, through their fraudulent and anti-competitive acts, have been and are able to foreclose competition, prevent reasonable substitutability, preclude cross-elasticity of demand, obtain supra-competitive prices and price discriminate between customers for Copier Equipment and Service, comprise two (2) markets. These are the relevant markets for: (i) replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts; and (ii) Copier Service for IKON and GE customers with Flexed IKON Contracts. IKON and GE have foreclosed over 80% of these markets from competition. Two (2) additional, broader, relevant markets, in which IKON and GE have unreasonably restrained a substantial amount of trade, are the markets for: (iii) the sale of Copier Service for Canon and Ricoh brand Copier Equipment; and (iv) the sale of Copier Equipment. IKON and GE have foreclosed competition in over 40% and 20% of these markets, respectively.

I. Foreclosure of Competition and Injury to Consumers

21. IKON and GE's intent and purpose in employing the Market Imperfections, Unfair Business Practices and Flexed IKON Contracts was for IKON and GE to be able to preclude competition from, to price discriminate against and to charge supracompetitive prices to consumers of Copier Equipment and Copier Service in the two (2) primary relevant markets (the markets for: (i) replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts; and (ii) Copier Service for IKON and GE customers with Flexed IKON Contracts). IKON and GE are, through the use of these devices, able to impose on such consumers in these two (2) relevant markets significant (exceeding 10%) and nontransitory (exceeding one (1) year) price increases, without consumers switching to competitive substitutes.

22. Consumers with Flexed IKON Contracts are charged prices by IKON and GE which are often 50%, 100%, or more, than potential substitutes in order to replace IKON as their vendor for Copier Equipment and Copier Service. Small IKON and GE customers, including schools, churches and non-profits, often find themselves with equipment worth only $1,000-$2,000 in the used equipment market and facing claims by IKON and GE for "buy outs" and "lease end" payment claims of over $100,000. Larger IKON customers, including hospitals, associations and [8] businesses, often find themselves with dozens of machines worth $20,000-$50,000 in the used equipment market and

facing claims by IKON and GE in the range of $500,000-$1,000,000. Such consumers pay supracompetitive prices to IKON and GE for long periods of time, often for years because reasonable substitutability is not an option. Such consumers are unable, practicably, to substitute competitive Copier Equipment or Copier Service for that of IKON and GE. There is little or no cross-elasticity of demand between IKON and GE supplied Copier Equipment and Copier Service to IKON and GE customers with Flexed IKON Contracts and competitors' Copier Equipment and Copier Service.

23. The Market Imperfections, Unfair Business Practices and Flexed IKON Contracts were used, by IKON and GE to force customers to deal exclusively with IKON, IOS Capital and GE for replacement Copier Equipment and for Copier Service. IKON's own written description of the intent and desired result of their use of the combination of the Market Imperfections, Unfair Business Practices and Flexed IKON Contracts states that these make it "***virtually impossible for competition to penetrate [the customer's] account***."

24. Plaintiffs were competitors with IKON and IOS Capital and now compete with IKON and GE for the sale and financing of Copier Equipment and for Copier Service, except where IKON and GE are employing the Unfair Business Practices, Market Imperfections and Flexed IKON Contracts to exclude competition. As a result of IKON's and GE's unlawful actions in employing the Market Imperfections,

Unfair Business Practices and Flexed IKON Contracts, plaintiffs: (a) have been foreclosed and are being foreclosed from competing for the sale of Copier Equipment and Copier Service to IKON and GE customers with Flexed IKON Contracts; (b) have paid unlawful "buy-outs" and lease-end payments; and (c) have been injured in their businesses and property.

J. Statutory Bases for Action

25. This action is brought pursuant to: (a) the Sherman Act and the Clayton Act, 15 U.S.C. § 1, *et seq.*; (b) the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). *et seq.*; and (c) the Racketeer Influenced Corrupt Organizations Act ("R.I.C.O."), 18 U.S.C. § 1961, *et seq.* in order to obtain damages, declaratory relief and injunctive relief against IKON and GE.

[9] **II. Jurisdiction, Venue and Commerce**

26. The jurisdiction of this court is invoked and this action is instituted under the provisions of Sections 1331, 1332 and 1337 of Title 28, United States Code (28 U.S.C. §§ 1331, 1332 and 1337) and Sections 4, 12 and 16 of the Clayton Act (15 U.S.C.§§ 15, 22 and 26), based on diversity of citizenship, federal question and regulation of commerce. It is brought to declare the rights of plaintiffs, to recover damages sustained by plaintiffs as a result of defendants' unlawful actions and to obtain injunctive relief.

27. The matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

28. Venue is proper in the Northern District of California under Section 12 of the Clayton Act (15 U.S. § 22) and under 28 U.S.C. § 1391 because defendants IKON and GE transact business and are found within this District.

29. IKON has offices in the Northern District of California and is qualified to do business in California. IKON and GE have done and do substantial amounts of business in the Northern District of California, including the sales and financing of Copier Equipment and the sale of Copier Service. IKON and GE, as hereinafter set forth, intentionally violated Sections 1 and 2 of the Sherman Act, the Lanham Act and the Racketeer Influenced and Corrupt Organizations Act through acts which, in part, occurred in the Northern District of California and which have directly injured plaintiffs in their trade and business.

III. The Parties

A. Plaintiffs

30. Plaintiff NewCal Industries, Inc. ("NewCal") is a corporation organized and in good standing pursuant to the laws of the State of California, with its principal place of business in Pleasant Hill, California. NewCal is a supplier and servicer for Copier Equipment, primarily Canon brand products. NewCal provides equipment, service, supplies and financing

to customers in the greater San Francisco Bay Area. NewCal serves both the private and public sectors. It competed with IKON and IOS Capital for Copy Equipment and Copy Service customers and now competes with IKON and GE for such customers. NewCal has branch offices in San Francisco, [10] Santa Rosa and Monterey.

31. Plaintiff CPO, Ltd. ("CPO") is a corporation organized and in good standing pursuant to the laws of the State of California, with its principal place of business in Santa Clara, California. CPO is a supplier and servicer for Copier Equipment, including Canon, Konica, Kodak and Xerox brand products. CPO provides equipment, service, supplies and financing to customers in the greater San Francisco Bay Area. CPO serves both the private and public sectors. It competed with IKON and IOS Capital for Copy Equipment and Copy Service customers and now competes with IKON and GE for such customers.

32. Plaintiff Pinnacle Document Systems, Inc. ("Pinnacle") is a corporation organized and in good standing pursuant to the laws of the State of California, with its principal place of business in Pleasanton, California. Pinnacle is a supplier and servicer for Copier Equipment, including primarily Sharp brand products. Pinnacle provides equipment, service, supplies and financing to customers in the greater San Francisco Bay Area. Pinnacle serves both the private and public sectors. It competed with IKON and IOS Capital for Copy Equipment and Copy Service customers and now competes with IKON and

GE for such customers. Pinnacle has branches in San Francisco and San Jose.

33. Plaintiff Pacific Office Automation, Inc. ("POA") is a corporation organized and in good standing pursuant to the laws of the State of Oregon, with its principal place of business in Portland, Oregon. POA is a supplier and servicer for Copier Equipment, including Ricoh, Sharp, Minolta, Toshiba, Konica, Xerox, Hewlett Packard and Muratec brand equipment. POA provides equipment, service, supplies and financing to customers in the western United States. POA serves both the private and public sectors. It competed with IKON and IOS Capital for Copy Equipment and Copy Service customers and now competes with IKON and GE for such customers. POA has branch offices in Seattle, Everett and Tacoma, Washington; in Salem, Eugene, Bend, Medford and Klamath Falls, Oregon; and in Phoenix and Tucson, Arizona.

34. Plaintiff Kearns Business Solutions, Inc. ("Kearns") is a corporation organized and in good standing pursuant to the laws of the State of South Carolina, with its principal place of business in Easley, South Carolina. Kearns is a supplier and servicer for Copier Equipment, [11] including Kyocera-Mita and Muratec brand equipment. Kearns provides equipment, service, supplies and financing to customers in the southeastern United States. Kearns serves both the private and public sectors. It competed with IKON and IOS Capital for Copy Equipment and Copy Service customers and now

competes with IKON and GE for such customers. Kearns has a branch office in Hickory, North Carolina.

B. Defendants

35. Defendant IKON Office Solutions, Inc. ("IKON" – an acronym for "I Know One Name") is a corporation organized under the laws of the State of Ohio, with its principal place of business in Malvern, Pennsylvania. IKON is sued individually and as the successor to certain rights and liabilities of IOS Capital, LLC, which was merged into IKON effective March 30, 2004. IKON is a supplier and servicer for Copier Equipment, including Canon, Ricoh, Savin, Oce and Hewlett-Packard brands as well as its own brand of equipment. IKON provides equipment, service, supplies and financing to customers throughout the United States. IKON has customers in both the private and public sectors. IKON competes with plaintiffs for these customers. IKON is engaged in, and its activities substantially affect interstate and foreign commerce. IKON equipment, parts, supplies and services are advertised, promoted and sold, as described herein, in interstate and foreign commerce.

36. Defendant General Electric Capital Corporation is a corporation organized under the laws of the State of Delaware, with its principal place of business in Stamford, Connecticut. General Electric Capital, through its wholly owned subsidiary, GE Commercial Finance, doing business as IKON Financial Services™

(together "GE"), is sued individually and as the successor to certain rights and liabilities of IOS Captial, LLC, which were acquired by GE, effective March 31, 2004, from IKON. GE provides businesses with financial services and products, including lease financing and lease administration for Copier Equipment and Copier Service. Effective March 31, 2004, GE acquired certain assets and liabilities of IKON, including: (a) IOS Capital's lease servicing functions, facilities, systems and processes in Macon, Georgia; and (b) an approximately $1.9 billion IKON leasing portfolio, discounted to $1.5 billion. GE and IKON agreed, as part of the acquisition, that GE would service IKON's remaining lease portfolio of [12] approximately $1.4 billion and that GE would fund and service future lease originations of IKON on a preferred basis. The $1.9 billion leasing portfolio bought by GE and the $1.4 billion in leases of IKON serviced by GE through IKON Financial Services™ contain both original IKON Contracts and Flexed IKON Contracts.

37. GE has entered into contracts, combinations and conspiracies with IKON and with IKON and GE customers to carry out each of the illegal acts alleged herein. GE contracted with IKON to buy IKON Contracts and Flexed IKON Contracts at a discount in order to profit from collection of these. GE has contracted, combined and conspired with IKON to enforce the Flexed IKON Contracts, both those owned by IKON and those owned by GE. GE has contracted, combined and conspired with IKON to obtain and has

in fact obtained new IKON Contracts and Flexed IKON Contracts in order to profit therefrom. GE has also profited from these by direct renewal, in its own name, of IKON Contracts and Flexed IKON contracts. GE has contracted, combined and conspired to employ the Market Imperfections and Unfair Business Practices in conjunction with the Flexed IKON Contracts in order to profit therefrom.

C. Defendants' Predecessor: IOS Capital, LLC

38. IOS Capital, LLC ("IOS Capital") was formerly a limited liability company organized under the laws of the State of Delaware, with its principal place of business in Macon, Georgia. IOS Capital was a wholly owned subsidiary of IKON. It was formed in 1987 as the successor to various operating companies which provided lease financing and administration services for IKON sales. IOS Capital provided lease financing for IKON's Contracts and IKON Amendments, as well as billing, collection, quotes on equipment upgrades, buy-outs and lease-end services. IOS Capital, individually and with IKON, provided equipment, service, supplies and financing to customers throughout the United States. IOS Capital, individually and with IKON, served both the private and public sectors and competed with plaintiffs for customers. IOS Capital was engaged in, and its activities substantially affected interstate and foreign commerce. IOS Capital advertised, promoted, sold its goods and services, as described herein, in interstate

and foreign commerce. Effective March 30, 2004, IOS Capital was legally merged with and into IKON. Certain assets and liabilities of IOS Capital were acquired by GE through IKON, effective [13] March 31, 2004. These included IOS Capital's entire lease administration operation in Macon, Georgia, with its personnel.

IV. The Relevant Markets

A. Product Markets

39. The primary relevant product markets in this action, in which IKON and GE have unreasonably restrained competition are the markets for: (i) replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts; and (ii) Copier Service for IKON and GE customers with Flexed IKON Contracts. Two (2) additional relevant markets in which IKON and GE have unreasonably restrained a substantial amount of trade are the markets for: (iii) the sale of Copier Service for Canon and Ricoh brand Copier Equipment; and (iv) the sale of Copier Equipment.

B. Geographic Markets

40. The relevant geographic market and area of effective competition for the sale and leasing of replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts, for Copier Equipment generally, and for parts and supplies which are sold separately from Copier Service, is the

United States. Each of the plaintiffs may, with the cooperation of other dealers, supply Copier Equipment anywhere in the United States. The relevant geographic markets and areas of effective competition for Copier Service are local, usually a metropolitan area. They are based on the practicable limits for competitors and their branches to provide service, parts and supplies for such equipment when they are needed.

C. Descriptions of Markets

1. Relevant Market for Replacement Copier Equipment for IKON and GE Customers with Flexed IKON Contracts

41. Consumers seeking to buy Copier Equipment or to replace their Copier Equipment are, except for the anticompetitive restraints alleged herein, usually involved in the product market for interbrand Copier Equipment. Plaintiffs, except for the anticompetitive restraints alleged herein, compete horizontally with IKON and GE in the product market to supply consumers [14] seeking Copier Equipment or to replace their Copier Equipment with the brands of equipment that plaintiffs sell, service and finance and that are the same as, or comparable to the brands represented by IKON and GE.

42. Through use of Market Imperfections, Unfair Business Practices and Flexed IKON Contracts, IKON and GE have restrained substantial

trade in Copier Equipment sales and have built barriers to entry into the market for replacement Copier Equipment bought by IKON and GE customers with Flexed IKON Contracts. There is a lack of reasonable interchangeability and cross-elasticity in the product market for replacement Copier Equipment bought by customers of IKON and GE with Flexed IKON Contract, between that supplied by IKON and GE, on the one hand, and that supplied by competitors of IKON and GE, on the other. IKON and GE are able to obtain significant supracompetitive prices for the Copier Equipment they supply in this market and to achieve substantial price discrimination for such Copier Equipment between IKON and GE customers with Flexed IKON Contracts and other IKON and GE customers. These large supracompetitive prices (exceeding 10%) have been maintained for long periods, often many years.

2. Relevant Market for Copier Service for IKON and GE customers with Flexed IKON Contracts

43. Consumers seeking Copier Service for Copier Equipment which they do not wish to, or cannot practicably replace are generally, except for the anticompetitive restraints alleged herein, involved in the relevant product markets for intrabrand parts, service and supplies for the brand of equipment they own. Plaintiffs, except for the anticompetitive restraints alleged herein, compete horizontally with IKON and GE in the product market to supply consumers with

Copier Service that their brand of equipment requires.

44. Through the use of Market Imperfections, Flexed IKON Contracts and Unfair Business Practices, IKON and GE have built barriers to entry in the market for Copier Service generally and for Copier Service bought by IKON and GE customers with Flexed IKON Contract. There is a lack of reasonable interchangeability and cross-elasticity in the product market for Copier Service bought by customers of IKON and GE with Flexed IKON Contract, between that supplied by IKON and GE, on the one hand, and that supplied by competitors of IKON, on the [15] other. IKON and GE are able to obtain large supracompetitive prices for the Copier Service they supply in this market and to achieve substantial price discrimination for such Copier Service between IKON and GE customers with Flexed IKON Contracts and other IKON and GE customers. These large supracompetitive prices (exceeding 10%) have been maintained by IKON and GE for long periods, often many years.

45. IKON's own internal documentation (IKON's "Image Management Plus Flex Program" Field Training Manual) describes how IKON's "flexing" practices create a separate relevant market by preventing reasonable interchangeability and cross-elasticity for flexed customers. The Manual states that "the sales representative's ***primary objective*** in flexing is ***to extend the term beyond the original expiration date*** [of the IKON Contract]." (Emphasis

supplied.) This extension, the Manual states, "creates separation from the competition at the end of the original Agreement term . . [because] . . . the IKON sales upgrade number is based upon the original expiration date of the Image Management PLUS Agreement, while the competition's cost to upgrade includes all term extension periods." The "flex" according to the Manual "does not commit the customer to expensive future upgrades of their IKON equipment, ***so long as they continue to do business with IKON***." (Emphasis supplied.) IKON is thereby able to isolate these flexed customers from competition their replacement Copier Equipment and Copier Service.

46. In a typical example, a farm cooperative in California with five (5) machines had an IKON "sales upgrade" charge, which IKON or GE would waive, of about $11,000, but a competitor's buy-out which "include[d] all term extension periods totaling about $75,000.

3. Practical Indicia of the Relevant Markets

47. Persons in the Copier Equipment and Copier Service industry and the public recognize that IKON and GE customers with Flexed IKON Contracts are a separate market. Many potential competitors of IKON, recognizing the high barriers constructed by IKON and GE and the futility of trying to enter this market, do not challenge IKON

and GE. Many customers in this market, faced with huge "buy outs" as a result of IKON's and GE's use of Market Imperfections, Unfair Business practices and their Flexed IKON Contracts, recognize their unique position and do not seek substitutes.

[16] 48. There are distinct customers in the markets for Copier Equipment and Copier Service who have Flexed IKON Contracts. Nearly 100% of IKON and GE accounts with high gross revenues, where IKON has taken over dominance from Xerox, are customers with Flexed IKON Contracts. IKON's own Senior Vice President of Marketing stated that IKON does "extraordinarily well at the high end because those customers historically didn't have a choice" and that IKON is "now able to go in and dramatically grow our national accounts" at such big companies. Partners HealthCare, in Boston, Massachusetts, is just such a large account, with some 1700 machines and Flexed IKON Contracts. A potential competitor of IKON, New England Copy Specialists, was the low competitive bid for replacement Copier Equipment and Copier Service, but was unable to get business because of IKON's $7 million "buy out" demand. Partners HealthCare remained with IKON and GE and as a result is paying supracompetitive prices for Copier Equipment and Copier Service and is still paying equipment charges on antiquated 7, 8 and 9 year old equipment.

49. The replacement Copier Equipment and Copier Service for IKON and GE customers with

Flexed IKON Contracts has characteristics and uses peculiar to it that are not present in the broader inter-brand market for original Copier Equipment and Copier Service. These characteristics include all of the Market Imperfections set out above. These also include all of the "built in" barriers of the Unfair Business Practices and the Flexed IKON Contracts, also set out above.

50. The market for replacement Copier Equipment and Copier Service for IKON and GE customers with Flexed IKON Contracts has distinct prices and sensitivity to price changes. IKON and GE are able to obtain supracompetitive prices in this market. These prices are as much as 100% or more than the prices a competitor could supply the same Copier Equipment and Service configuration for (supracompetitive pricing), and, the prices IKON and GE would obtain for the same Copier Equipment and Service configuration in a new deal with a different IKON or GE customer (price discrimination). Despite these huge price differentials, relatively few IKON and GE customers in this market change vendors, reflecting an extraordinary lack of price sensitivity.

[17] 51. The market for Copier Service for IKON and GE customers with Flexed IKON Contracts as well as the broader market for Copier Service for Canon and Ricoh Copier Equipment has specialized vendors. Consumers of Copier Service are recognized according to the brand of equipment they own. For example, an owner of Canon or Ricoh brand equipment from IKON or GE which is in need of

Copier Service needs Canon or Ricoh compatible parts and qualified Canon or Ricoh service. Xerox parts and service for Xerox equipment is not a satisfactory substitute for Canon or Ricoh compatible parts or for qualified Canon or Ricoh service. Parts not designed for and not compatible with a particular brand do not allow equipment to perform consistently at the highest levels and equipment using such parts may require more frequent service.

52. Members of the Copier Equipment industry understand and agree that the brand of equipment differentiates various consumers for Copier Service. There are separate markets for parts and service for each of the major equipment brands. Different marketing strategies are employed in attempting to sell parts and service to owners of different brands of equipment. Distinct prices for parts and service are employed, based on the brand of equipment. Different sensitivities to price changes exist as to the parts and service for different brands of equipment.

53. Certain factors may contribute to owners of Copier Equipment being locked-in to purchasing Copier Service for that equipment rather than switching to other equipment. These factors include: (a) high capital investment in the equipment, where used-equipment sales or buy-out markets are not functioning efficiently; (b) the difficulty and cost of terminating contracts for existing equipment; (c) the difficulty of obtaining single-source service and repair for multiple equipment brands; (d) the existence of significant information costs for purchasers and

owners of Copier Equipment; (e) the difficulty or impossibility of life-cycle costing Copier Equipment; (f) the unavailability of separate life-time warranties or contracts for parts and service; (g) price discrimination between customers; (h) the switching by a manufacturer or dealer of their policies toward a customer after equipment is purchased; (h) the changing of customers' contracts, as by "flexing" and extending them without their knowledge; and (i) other practical factors in the marketplace.

[18] **V. The Unlawful and Anticompetitive Actions of IKON and IOS Capital**

A. Background

54. IKON, in its fiscal 2003 10-K, stated that it was "the world's largest independent distribution channel for copier and printer technologies" with $4.7 billion in annual revenues. IKON was, by a large factor, the largest Canon dealer worldwide, with $1.0 billion in annual purchases from Canon and over 40% of the distribution for Canon Copier Equipment in the United States.

55. Of the equipment sold by IKON in the United States in 2003, 81% was financed by IOS Capital, prior to the GE deal, which was effective March 31, 2004. 96% of IOS Capital's lease portfolio consisted of "direct financing leases," *viz.*, contractual obligations between IOS Capital and IKON customers. IOS Capital also performed billing, collection, equipment quotes and lease-end financial services for

IKON customers on these leases. The remaining 4% of IOS Capital's lease portfolio were "funded leases," *viz.*, contractual obligations between IKON and/or IOS Capital and the customer which had been financed by IOS Capital, but were invoiced by IKON.

56. A very high percentage, by dollar volume, of IKON and IOS Capital "leases" (over 90% in the San Francisco Bay area) were "bundled" contracts in which the customer paid for the equipment, maintenance, service, parts and supplies (excluding paper) in monthly payments (95% of the time) or in quarterly, semi-annual or annual payments (rarely). The compensation packages for IKON sales people were heavily weighted in favor of selling these bundled contracts. In 2003, the typical lease of IOS Capital averaged $23,000 in amount and 51 months in duration (for the original term, before flexing).

57. These bundled "leases" were generally referred to generically as "cost-per-copy" contracts. They were also known by various IKON trade names, including "Images Plus," "Image Management" and "Image Management Plus" contracts. The leases provided for a minimum monthly payment, which was determined by a cost per image, which was multiplied by the customer's guaranteed monthly minimum number of images. In addition, the customer paid for images over the guaranteed minimum number, on a per-image basis.

[19] 58. The economics of these "leases" dictate that until about 70% of the lease term has run, it is

not practicable for a consumer or a competitor to make a deal to replace the IKON equipment and service, even based on reasonable costs for a "buy-out" from IKON (which rarely occurred because of IKON's Unfair Business Practices). Within the remaining period of the lease – the last 30% of the term – or upon its expiration, a competitive bid by plaintiffs or another competitor of IKON and IOS Capital to replace Copier Equipment under and IKON contract could practicably pay for or finance reasonable "buy-out" or "lease-end" charges and could offer the consumer competitive bids to supply its Copier Equipment and Copier Service – if IKON had not engaged in its "flexing" practices and methods of enforcing them, as described below.

59. Consumers of Copier Equipment periodically need to change that equipment (*viz.*, adding to, subtracting from, replacement of, upgrading, updating or adding accessories to their equipment). Competitors which supply equipment and financing for such equipment, including IKON, GE and plaintiffs, recognize that at least every few years equipment consumers are, or should be in the market to replace their Copier Equipment. Leases for Copier Equipment are generally designed to be fully amortized over a period of 60 months, 5 years. Independent leasing companies and third-party purchasers of leases generally write, or buy, shorter leases, with 3 or 4 year terms. IOS Capital and GE, as captive leasing companies, have written or have bought leases with 60 month terms for IKON customers.

60. Reasonable "buy-out" charges, before the expiration of a typical 60 month lease, would customarily include: (a) discounted remaining equipment financing charges for the 60 month term; (b) the profits on unused parts, supplies and service; (c) the fair market value ("FMV") of the equipment, typically 10% of its original cost; and (d) rigging and transportation charges to return the equipment to IKON or GE. Reasonable "lease-end" charges would include only items (c) or (d). These "buy-out" and/or "lease-end" charges are the charges that an IKON or GE competitor, like plaintiffs, would normally be forced to pay in order to compete for IKON or GE customers, or, that IKON or GE customers would be forced to pay if they elected to do business with someone besides IKON or GE in replacing their Copier Equipment which was subject to an IKON Contract.

[20] 61. IKON and IOS Capital, however, developed and employed a pattern of fraudulent, unfair and otherwise unlawful practices which were specifically designed to: (a) obtain the original IKON Contracts; (b) extend the term of IKON Contracts in order to exclude competitors during or beyond the contract's original term; (c) obtain supracompetitive profits from the IKON Contracts; (d) price discriminate against customers with IKON Contracts; and (e) inflate "buy-out" or "lease-end" charges under the IKON Contract.

B. Original IKON Contracts

62. The pattern of fraudulent practices employed by IKON and IOS Capital began with the original IKON Contract. In order to induce the customer to enter into such contracts IKON falsely represented to the customer or concealed from the customer the following: (a) IKON represented that its IKON Contract allowed flexibility to customer needs – but concealed that such flexibility had, as its primary purpose and effect, the extension of the term of the IKON Contract; (b) IKON represented that the IKON Contract was intended by IKON and would, in fact, last for a fixed period, usually 60 months – but concealed that the vast majority of contracts were intended to be and were, in fact, "flexed" and extended well beyond 60 months; (c) IKON represented that the contract, including the models of equipment, configuration of equipment, monthly minimum requirements and overage charges were designed to meet the needs of the customer; (d) IKON represented that the customer would fully amortize the equipment cost except for a small fair market residual value over the 60 month term of the IKON Contract, and (e) IKON represented that because it had a captive leasing company that was 100% owned there would be no problems with attempts to shift responsibility or blame between the entity servicing the Copier Equipment and the entity financing it.

63. These representations were not true for the following reasons: (a) and (b) IKON intended, at the outset of the IKON Contract, to extend the period of

the lease through its "flexing" practices. IKON's own "Image Management Plus Flex Program" Field Training Manual stated that "the sales representative's ***primary objective*** in flexing is to extend the term beyond the original expiration date [of the IKON Contract]." IKON heavily weighted compensation to its salespersons to encourage "flexing" practices and engaged in extensive training of its salespersons [21] on how to deceive the customer and achieve the "flex." IKON, in fact, extended the term of the vast majority of IKON Contracts, in some regions over 90% of them by dollar volume. (c) IKON encouraged its salespersons to assure that the design of the IKON Contract program would not meet the needs of the customer so that the program would need to be changed, creating an opportunity for the customer to be "flexed." IKON salespersons were given training in identifying customers for whom an IKON Contract program was not working and in how to "flex" them. (d) IKON and GE did not intend to allow the customers to amortize fully the cost of the equipment and to buy it out for fair market value. IKON rarely allowed such a fair market buy out at the end of a 60 month term at the customary amount in the industry, 10% of the original cost of the equipment. Buy-out quotes usually included the extended term and gross payments for service/parts/supplies for that extended term. (e) IKON and IOS Capital (and IOS Capital's successor, GE) engaged in extensive blame-shifting and denial of responsibility when customers under IKON Contracts had equipment, service, financing, billing, contract or other problems.

64. IKON described the cornerstone of its IKON Contract amendment practices in its "Field Training Manual" for the "Image Management Plus Flex Program," as "flexing" or "the selling activities, related to amending the customer's Image Management PLUS Agreement." The amendment was in the form of an innocuous looking, simple, one page "amendment" or "addendum" which obfuscated the intent and purpose of the amendment – the extension of the term of all IKON Copier Equipment placed with that customer. An example of a widely used IKON Amendment, entitled "IKON Office Solutions Images Plus Program Addendum" is attached to this Complaint as **Exhibit A** and made a part hereof.

C. Amending the Original IKON Contract – "Flexing"

65. IKON's "Image Management Plus Flex Program" Field Training Manual states that "the sales representative's primary objective in flexing is to extend the term beyond the original date." In order to achieve this, IKON trained its sales representatives to conceal the fact that the term of the IKON Contract was being extended and to use a pretext to get a customer's signature on the amendment.

66. The pretexts used by IKON sales representatives to get the customer to sign the [22] amendment included: (a) claiming that the customer was eligible to receive a "free" machine; (b) adding accessories, digital servers network connections or software;

(c) swapping out a bad-performing machine at "no charge;" (d) upgrading older generation machines; (e) raising or lowering the monthly minimum number of images, at IKON's suggestion, to "save" the customer money; (f) changing the per-image charge to "help" the customer; and (g) adding or reducing the number of machines, again to "help" the customer.

67. In each of these situations, the IKON representative intentionally would conceal the fact that the term of the IKON Contract was extended by the IKON Amendment or would even misrepresent to the customer that it was not extended. A number of techniques were employed, in addition to the "pretexts," to obtain a customer's signature on the amendment.

1. The IKON Amendment Form

68. IKON purposely made the IKON Amendment form simple looking and changed it so that the customer would not realize IKON was extending the term on *all* equipment in the customer's IKON fleet by just signing the form. The IKON Amendment form stated at the bottom merely:

"You are applying to us to amend the Agreement as described above. The amended term will commence on the customer acceptance date indicated below. Billing for the amended amount will begin on the next payment date under the agreement. All original guarantees and terms and conditions of the above

referenced Agreement(s) are still enforced (sic) and binding on each party."

69. The only other references on the IKON Amendment regarding this language were at the top of the form and stated merely:

"Term: ____Months" "Original Agreement Number_____"

70. Sophisticated attorneys reading and signing IKON Amendments with this language did not understand it to extend the term on all of their IKON equipment then under contract. Even after IKON made its claim that the IKON Amendment had flexed (extended) all of their IKON equipment, these attorneys did not believe it legally extended the term on all of their IKON equipment.

71. IKON had *eliminated* certain bold face language which was contained in the earlier amendments/addenda forms in the mid 1990's. This deleted language read:

> [23] "**The number entered into the term box above indicates the number of months the entire agreement now has left to run, starting on the next billing date. Depending on the number of months entered, this addendum may extend the length of the original agreement.**"

An example of an amendment form with this language in it, from the 1990's, is attached as to this

First Amended Complaint as **Exhibit B** and made a part hereof.

72. An IKON administrative officer who received complaints about the deceptiveness of the new language in the late 1990's and early 2000's and who wanted to put explanatory language back into the form was told "no" because IKON had intentionally taken such language out so the customer would not understand that IKON would claim that the IKON Amendment extended the term of all of the customer's IKON equipment.

2. Direct Deception of Customers

73. IKON salespersons went further and engaged in active deception with regard to the IKON Amendment. If asked what the "Term 60 Months" meant when it was filled out with a "60", IKON salespersons were trained to state that it was the "term of the original agreement." IKON salespersons were also trained not to bring the original agreement or make reference to the equipment on the original agreement when they were obtaining the IKON Amendment. Often, the blank for "Original Agreement Number: ___ "was intentionally not filled in when the customer signed the IKON Amendment.

74. In order to further deceive the customer IKON trained its sales staff to show the customer a chart with each machine on an IKON Amendment being separately treated by each IKON Amendment, rather than the term of all of the customer's IKON

equipment being extended by each IKON Amendment. The chart which the IKON sales person was trained to show the customer, assuming four (4) machines with differing installation and expiration dates, 2 years apart, and each with a 60 month term, looked as follows:

[24] **Year 0 1 2 3 4 5 6 7 8 9 10 11**

Machine 1 o----------o

Machine 2 o----------o

Machine 3 o----------o

Machine 4 o----------o

This chart suggests, falsely, that each machine has a separate expiration date and can be renewed with IKON (or with someone else) separately, at its original expiration date, five (5) years from installation.

75. The reality was that IKON, by employing an IKON Amendment, would take the position, that the installation of each new machine extended the term of all existing machines of the customer to the end of the full term of the most recent install. This reality, concealed from the customer, is as follows (with "o" representing the original start and expiration dates for each machine, with "F1, F2, etc." representing each flex on each machine and "X1, X2, etc" representing the extended expiration dates):

Year	0	1	2	3	4	5	6	7	8	9	10	11
Machine 1	o	-----	F1	----	F2	--o-	F3	---XI	---	X2	----	X3
Machine 2		o	------		F1	-------	F2	--o	------	X1	----	X2
Machine 3			o	--------		F1	----------		o	--------		X1
Machine 4				o	----------			----------				o

For this IKON customer, IKON would have achieved an extra 144 months of billings or "buy out" demands, and would have been able to bill for Machine 1 for six (6) years after it should have been fully amortized. This led to IKON and GE customers still paying equipment costs on equipment that 7, 8, 9, 10 or 11years old.

76. IKON's motive to deceive the customer as to the claimed effect of the IKON Amendment is reinforced by IKON's and GE's use of the "two computer screens" for each customer, one showing no flex (labeled in IKON's internal documentation as "Customer's View of Transactions") and one showing the flexed/extended term (the second chart above, to be used in [25] case of a competitive buy-out, and labeled in IKON's internal documentation as "IKON's View of Transactions). "Buy out" quotes showing the extended terms were not to be given to the customer, but were labeled "For Internal Use Only. Do Not Share With Customer."

77. Additional devices were used by IKON and GE to deceive the customer. (a) Amendment forms were devised where blanks that were not filled in, like the length of the amendment term, would default

to terms of the original agreement, creating an extension equal to that of the original term, usually 60 months. (b) IKON sales representatives were allowed and trained to get a signature on the IKON Amendment from the lowest ranking person in the customer's office, not from the person responsible for or knowledgeable about the IKON Contracts. (c) IKON sales representatives took advantage of immediate and/or dire needs of customers, such as defective or broken equipment which needed replacing immediately, to obtain a signature on the amendment. (d) If a customer discovered it had signed a "flex" amendment, IKON sales representatives would often obtain another "flex," allegedly to ameliorate the original "flex" and "help" the customer.

78. IKON and GE continued to hide the "flex" from the customer. Where there was no change in the monthly billing amount charged by IKON, IOS Capital or GE where the billing amount differed only as agreed upon by the customer in the amendment, the customer would not suspect an extension of the term of the original IKON Contract. Because the extension of the term of the IKON Contract in a "flex" occurred during the original term, the extension would likely not be discovered by the customer until the original term had ended and only then if the customer had been able to calendar the expiration of the term for each piece of equipment. Calendaring the date was difficult, because IKON often did not honor the language in the IKON Amendment that the effective date was "the customer acceptance date indicated below" and would tack, 2 or 3 months, or even up to 7

months on to the 60 month flex. Unless poor equipment performance or poor service intervened and the customer sought to terminate or "buy-out" the IKON Contract there was no way of discovering the flex. Even then, IKON and GE would often conceal the way the buy-out was computed and the term extension.

[26] 79. The term extension achieved by the IKON Amendment, the "flex", was completely concealed from the customer until long after it was signed. It did not constitute a "reasoned" contractual restraint entered into by the customer knowingly. It was not, and could not possibly have been a part of the customer's calculus in signing the IKON Amendment. It intentionally prevented the customer from life-cycle costing the contract for Copier Equipment and Copier Service. IKON and GE "switched" their story and the alleged legal position of the customer only after considerable time had elapsed after the signing of the IKON Amendment and only where the customer sought to make a rational decision to leave IKON or GE, based on what the customer rightfully believed the IKON Contract and IKON Amendment provided. IKON and GE's policy was not only totally unknown by their customers, but rarely known or understood by competitors in the copier industry.

80. The anticompetitive purpose and effect of the fraudulent extension of the original term was made clear in the IKON Field Training Manual. The manual stated that flexing makes it "[v]irtually impossible for competition to penetrate [the] account." The manual explained that "[I]t creates

separation from the competition at the end of the original Agreement term . . . the IKON sales upgrade number is based upon the original expiration date of the Image Management PLUS Agreement, while the competition's cost to upgrade includes all term extension periods."

81. This meant that if plaintiffs or other competitors of IKON and IOS Capital wanted to supply equipment and/or service to a "flexed" IKON customer they would be quoted "buy-out" numbers based on the date to which the amendment or amendments extended the original contract, *viz*, "all term extension periods." These "buy-out" numbers would require payments for the equipment for periods beyond the fully-amortized equipment cost. Additionally, these "buy-out" numbers would require payment for all unused parts, supplies and service, until the end of the extended term, despite the fact that: (a) the customer would not have the equipment and not be using it; (b) IKON would not be required to provide any service, parts or supplies to the customer for the payments being demanded; and (c) the legal measure of damages IKON would be entitled to for such a termination would only be present-valued lost profits, after mitigation, not gross revenues without credit for mitigation.

[27] 82. Outside attorneys used by IKON and GE advised managers to lie to customers about the customers' legal responsibility for the flexed term and for unused parts, supplies and service and to tell them that they could be held legally liable for the

gross payments due for the flexed term – then to negotiate down if the customer balked.

D. Additional Unfair and Anticompetitive Actions of IKON and GE

83. Competition for customers in the markets for Copier Equipment and Copy Service centers around existing customers. Growth is achieved primarily through sales to competitors' existing customer base. IKON and GE, for this reason, have taken actions to exploit their customers through "installed base opportunism," enhancing and exploiting the market power derived through their Market Imperfections, Unfair Business Practices and Flexed IKON Contracts, and through other devices as well.

84. IKON's, IOS Capital's and GE's techniques for preventing competition for their customers after the fraudulent obtaining of the Flexed IKON Contract involved an array of additional fraudulent schemes and artifices which were included in their "Unfair Business Practices." (a) If a customer discovered the "flex" and objected to it IKON, IOS Capital and GE would cut off service for all of the customer's equipment, would give adverse credit reports against the customer. would threaten suit and would institute litigation. (b) If a customer were seeking to leave IKON, IOS Capital or GE, they would quote exorbitant buy-outs and refuse to itemize what such buy-outs were for (*viz.* whether they were for lease financing, fair market residual value, service, parts, supplies,

property taxes, late fees, termination fees or other goods or services). (c) IKON, IOS Capital and GE would quote fair market residual value buy-outs as much as 35%, or more, of the original equipment cost on 60 month leases, when the industry standard was 10%. (d) IKON, IOS Capital and GE would fail to provide the customer with copies of its original IKON contracts and amendments at the time they were signed on the pretext that they had to be approved; (e) IKON, IOS Capital and GE would refuse to provide to the customer complete copies of all IKON Contracts and Flexed IKON Contracts if requested by a customer when a dispute arose, leaving the customer without the ability to know its rights and obligations; (f) IKON, IOS Capital and GE would use their own billing and administration problems, which were legion, to add [28] penalty charges, if customers legitimately questioned the billings or contract obligations and withheld payment; (g) IKON, IOS Capital and GE would add grossly inflated charges for rigging and for shipping the equipment back to IKON, IOS Capital or GE – as much as 10 times fair market rates. (h) If a customer obtained competitive equipment to replace IKON Copier Equipment before the end of the "flexed" term, even if the "buy-out" amounts were paid, IKON, IOS Capital and GE would refuse to pick up their equipment or refuse to take delivery of it from the customer's shipper – requiring the customer to leave it on its premises or to arrange for it to be stored. Competitors of IKON, IOS Capital and GE were often forced to warehouse large numbers of IKON and IOS Capital equipment

for long periods, after a buy-out terminated the IKON Contract or Flexed IKON Contract. (i) IOS Capital and GE would often continue to bill the customer, make adverse credit reports and threaten litigation, even buy-outs were agreed upon or after equipment was returned. (j) After equipment was returned to IKON, IOS Capital and GE, they would bill for phantom damages to the equipment or alleged lost parts and accessories. (k) IOS Capital and GE would add to their final claim, on top of the buy-out, other previously unbilled amounts, such as late charges and property taxes.

85. IKON, IOS Capital and GE used the fact that IKON marketed the IKON Contracts, obtained IKON Amendments and provided Copier Service, whereas IOS Capital and GE thereafter administered the leases, billed the customers, issued buy-out demands and lease-end demands in order to try to avoid responsibility for proper servicing of the equipment and to skirt financing disclosure laws or claims of fraud. If a customer complained to IOS Capital or GE about the failure of disclosure and fraudulent conduct of IKON salespersons, described above, the customer would be referred to IKON under the pretext that IKON representatives had done all of the selling activities and that IOS Capital or GE was not responsible. IOS Capital or GE would tell the customer that they were not responsible for servicing the equipment if the customer complained about service not satisfying the 95% up-time requirement. IOS Capital or GE would cut off the servicing of the

equipment in dispute (and all of the customer's other equipment) and would continue to bill the customer if the customer stopped making payments to IOS Capital or GE based upon a breach of the servicing guaranties.

[29] 86. GE, d/b/a "IKON Financial Services," took over the administration of IKON equipment customers from IOS Capital and is now disavowing any responsibility for servicing problems. This is the case even though servicing is bundled with equipment financing in a cost-per-copy or lease contract in the IKON Contract and even though servicing problems may form the basis for the customer's termination of the IKON Contract or IKON Flexed Contract. GE Capital is now claiming that IKON, not GE is solely responsible for service and that GE it is entitled to lease and lease-end payments irrespective of IKON's failure to service the equipment and maintain 95% up-time.

87. IKON, IOS Capital and GE have engaged in other unfair and anticompetitive practices, in conjunction with the above, which facilitated and enhanced their restraints on competition from plaintiffs and other competitors in the relevant markets. These practices included the following: (a) paying very low commissions to salespersons for original term IKON Contracts to force salespersons to sell "flex" deals; (b) employing a "refuse to lose" program against selected competitors in which IKON bid lower prices against select competitors, including those who hired ex-IKON employees; (c) using supracompetitive profits

from "flexed" accounts to obtain and subsidize original term IKON Contracts; and (d) instituting baseless litigation against former IKON salespersons who left IKON with knowledge of the flexing practices and the customers against whom it was used and went to competitors. These practices, together with the fraud in the inducement of the original contracts, allowed IKON to: obtain new customers at well below the costs of other Copier Equipment dealers; "flex" these new customers; protect its installed base from competition; price discriminate against such base; and obtain supracompetitive profits from this base.

88. Specific examples of IKON and GE customers and the specifics of the fraudulent and anticompetitive practices engaged in by IKON, IOS Capital and GE on these customers include, but are not limited to the following IKON Contract and Flexed IKON Contract customers and following specific misrepresentations and practices:

(a) Cascadia Behavioral Health Care, Portland, Oregon: misrepresentations and practices set out at paragraph 61(a)-(d) and one or more of those set out in each of [30] paragraphs 12-14, 62-63, 66-67, 73-75 and 77-78, above, during the period from in or about 1996 through June, 2004;

(b) Joyful Noises Church Preschool, Escondido, California: misrepresentations and practices set out at paragraph 61(a)-(d) and one or more of those set out in each of paragraphs 12-14, 62-63, 66-67, 73-75 and 77-78,

above, during the period from in or about 1997 through June, 2004;

(c) Gila County, Arizona, Globe, Arizona: misrepresentations and practices set out at paragraph 61(a)-(d) and one or more of those set out in each of paragraphs 12-14, 62-63, 66-67, 73-75 and 77-78 above, during the period from in or about 1995 through June, 2004;

(d) Galgon Industries, Fremont, California: misrepresentations and practices set out at paragraph 61(a)-(d) and one or more of those set out in each of paragraphs 12-14, 62-63, 66-67, 73-75 and 77-78 above, during the period from in or about 1992 through June, 2004;

(e) Universal Manufacturing, Kansas City, Missouri: misrepresentations and practices set out at paragraph 61(a)-(d) and one or more of those set out in each of paragraphs 12-14, 62-63, 66-67, 73-75 and 77-78, above, during the period from in or about 1990 through June, 2004;

(f) Pacific Coast Producers, Woodland, California: misrepresentations and practices set out at paragraph 61(a)-(d) and one or more of those set out in each of paragraphs 12-14, 62-63, 66-67, 73-75 and 77-78, above, during the period from in or about 1998 through June, 2004;

(g) JH Kelly Holdings, Vancouver, Washington: misrepresentations and practices set

out at paragraph 61(a)-(d) and one or more of those set out in each of paragraphs 12-14, 62-63, 66-67, 73-75 and 77-78 above, during the period from in or about 1990 through June, 2004; and

(h) Larabee & Zimmerman, LLP, San Diego, California: misrepresentations and practices set out at paragraph 61(a)-(d) and one or more of those set out in each of [31] paragraphs 12-14, 62-63, 66-67, 73-75 and 77-78, above, during the period from in or about 1995 through March, 2004;

VI. Claims for Relief

A. First Claim for Relief
(Against IKON and GE)
Unreasonable Restraints of Trade
(Section 1 of the Sherman Act, 15 U.S.C. § 1)

89. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 88 inclusive, above, to the extent they are consistent with the facts alleged in this cause of action, with the same force and effect as if said paragraphs were herein set forth in full.

90. IKON, IOS Capital and GE have unreasonably restrained competition by and through their IKON Contracts and IKON Amendments and their use of Market Imperfections, Unfair Business Practices and Flexed IKON Contracts in the markets for: (i) replacement Copier Equipment for IKON and GE

customers with Flexed IKON Contracts; and (ii) Copier Service for IKON and GE customers with Flexed IKON Contracts. They have also, in this manner, unreasonably restrained a substantial amount of trade in the markets for Copier Equipment and for Canon and Ricoh brand Copier Equipment. IKON's, IOS Capital's and GE's contracts and their fraudulent and unlawful practices have damaged competition in these markets and harmed consumers by unreasonably foreclosing plaintiffs and other competitors and preventing or restricting their access to these markets and thus have violated Section 1 of the Sherman Act.

91. IKON's, IOS Capital's and GE's contracts, combinations and conspiracies and the acts related thereto, which unreasonably restrain competition in these markets include, but are not limited to: (a) obtaining and enforcing Flexed IKON Contracts using any of the techniques described in the allegations of paragraphs 12-14, 62-63, 73-75, 77-78 and 84-86, above; (b) engaging in the "buy-out" and "termination" practices of IKON, IOS Capital and GE under Flexed IKON Contracts as described in the allegations of paragraphs 84-86, above; (c) employing IKON, IOS Capital and GE as different entities for selling and administering financing leases in the form of IKON Contracts and Flexed IKON Contracts in order to avoid lending and other disclosure laws [32] and engaging in practices to coerce customers, as described in the allegations of paragraphs 12-14, 62-63, 73-75, 77-78 and 84-86, above; and (d) engaging in

the practices which assist in the sale of fraudulently induced original IKON Contracts and Flexed IKON Contracts by IKON, IOS Capital and GE as described in the allegations of paragraphs, above.

92. The contracts, combinations and conspiracies of IKON, IOS Capital and GE set out in paragraph 91, subparagraphs (a) through (d), above, unreasonably restrain trade and restrict the access of plaintiffs to the market for replacement, upgrade or addition of Copier Equipment in the significant installed equipment base of IKON, IOS Capital and GE after 70% of the original term has expired and upon the expiration of the original term on their IKON Contracts, thereby restraining competition in the markets for the sale, financing and service of Copier Equipment of these customers.

93. The combinations and conspiracies of IKON, IOS Capital and GE set out in paragraph 91, subparagraphs (a) through (d), above, unreasonably restrain trade and restrict the access of plaintiffs to the relevant markets for the sale of service, parts and supplies to the significant installed base of IKON, IOS Capital and GE Copier Equipment after 70% of the original term and upon the expiration of the original term of their IKON Contracts on this equipment, thereby restraining competition in the relevant markets for: (i) replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts; and (ii) Copier Service for IKON and GE customers with Flexed IKON Contracts.

94. These actions of IKON, IOS Capital and GE, by unreasonably restraining trade and restricting the access of plaintiffs to the said markets restrain competition in these markets, are not justified by plausible arguments that these actions were intended to increase output, enhance the efficiency of, lower prices of or make more competitive the markets for interbrand Copier Equipment, the market for intrabrand Copier Service for Canon and Ricoh brand Copier Equipment, the replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts; and Copier Service for IKON and GE customers with Flexed IKON Contracts. These actions in fact injure competition and consumers, decrease output, raise prices and decrease economic efficiency in said markets. The likelihood of anticompetitive effects from such actions is [33] clear and the possibility of procompetitive effects is remote.

95. The harm to competition from these restraints outweighs any procompetitive effects. The restraints produce significant anticompetitive effects within the relevant markets. Any legitimate objectives of defendants can be achieved in a substantially less restrictive manner.

96. The purpose, intent and effect of these actions of IKON, IOS Capital and GE were to restrain trade and competition in the said markets.

97. These actions of IKON, IOS Capital and GE constitute unreasonable restraints of trade and

commerce and therefore violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

98. By reason of IKON's, IOS Capital's and GE's unlawful actions and as a direct and proximate result of such actions plaintiffs have been injured in their businesses and properties through monies paid to IKON, IOS Capital and GE, and through additional costs incurred, lost sales, lost profits and loss in the value of their businesses. Plaintiffs have, and will continue to suffer irreparable harm and the public will be damaged through IKON's, IOS Capital's and GE's aforesaid unlawful actions in violation of Section 1 of the Sherman Act. Plaintiffs have no adequate remedy at law for this irreparable harm.

99. The aforesaid violations of Section 1 of the Sherman Act by IKON, IOS Capital and GE have had, will have and will continue to have the following effects, among others: (a) IKON IOS Capital and GE have restrained, suppressed and eliminated actual and potential competition in the interbrand market for the significant installed base of IKON, IOS Capital and GE Copier Equipment after 70% of the original term has expired and upon the expiration of the original term of their IKON Contracts for this equipment; (b) the public has been denied the benefits of unrestricted competition in a free and open market for Copier Equipment and for service, parts and supplies for that equipment; (c) the prices paid by the public for Copier Equipment and for service, parts and supplies for that equipment have been higher; (d) the quality of the Copier Equipment and service,

parts and supplies for that equipment have been lower; (e) the output of Copier Equipment and service, parts and supplies for that equipment has been decreased; (f) plaintiffs and other competitors of IKON, IOS Capital and GE have been denied the benefits of unrestricted competition in free and open markets for Copier Equipment and for service, parts and supplies for [34] that equipment; and (g) plaintiffs and other competitors of IKON, IOS Capital and GE have been precluded from obtaining and performing substantial contracts for Copier Equipment and for service, parts and supplies for that equipment;

Wherefore, plaintiffs pray judgment against defendants IKON and GE as set forth below.

B. Second Claim for Relief
(Against IKON and GE)
Exclusive Dealing Arrangements
(Section 1 of the Sherman Act, 15 U.S.C. § 1)

100. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 99 inclusive, above, to the extent they are consistent with the facts alleged in this cause of action with the same force and effect as if said paragraphs were herein set forth in full.

101. Plaintiffs are actual and potential horizontal competitors of IKON and GE for the sale and financing of Copier Equipment and for Copier Service in the relevant markets for: (i) replacement Copier Equipment for IKON and GE customers with Flexed

IKON Contracts; (ii) Copier Service for IKON and GE customers with Flexed IKON Contracts; and (iii) Copier Service for Canon and Ricoh brand Copier Equipment.

102. IKON and GE possess market power over and exclusive access to the customers in their installed base in these relevant markets during and upon the termination of the original terms of their IKON Contracts, through their Market Imperfections, Unfair Business Practices and Flexed IKON Contracts. The ability of plaintiffs and other competitors to make economically practicable offers to IKON and GE customers in such base is necessary and essential to preserve competition for these customers.

103. IKON and GE have entered into exclusive dealing arrangements with their IKON Contracts, IKON Amendments and Flexed IKON Contracts which foreclose over 80% of such customers from dealing with competitors of IKON and GE in the relevant markets for (i) replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts and (ii) Copier Service for IKON and GE customers with Flexed IKON Contracts; and which foreclose over 40% of the such customers from dealing with competitors of IKON and GE for Copier [35] Service for Canon and Ricoh brand Copier Equipment.

104. These exclusive dealing arrangements last, with all of the "flexes," well beyond the original five (5) year term, and often last 6, 7 or 8 years. They

even last 10 or 11 years. There is no economically practicable way for customers to terminate these exclusive dealing arrangements. They are way beyond the industry standard in length. There are few if any reasonable alternative distribution channels for competitors to reach these markets. Competitors do not employ the same exclusive dealing arrangements. Competition in these markets is severely injured compared to the markets for customers of other suppliers of Copier Equipment and Copier Service.

105. IKON 's and GE's denying plaintiffs the ability to offer competitive quotes for Copier Equipment and Service, as herein alleged, is not justified by any plausible arguments that this was intended to increase output, enhance the efficiency of, lower prices of or make more competitive the market for interbrand Copier Equipment or the market for Copier Service for Canon and Ricoh copiers. The likelihood of anticompetitive effects from such is clear and the possibility of procompetitive effects is remote.

106. By reason of IKON's and GE's aforesaid unlawful contracts and as a direct and proximate result of such contracts, plaintiffs have been forced to pay to IKON and GE unlawful "buy-out" and "lease-end" fees, have lost sales, profits and the value of their businesses. Plaintiffs have and will continue to suffer irreparable harm through the loss of their trade and business, and the public will be damaged by: (a) the weakening or elimination of plaintiffs and others in these relevant markets.

107. The aforesaid violations of Section 1 of the Sherman Act have had, will have and will continue to have the following effects, among others, in the said relevant markets: (a) IKON and GE have achieved and will maintain unreasonable control over competition; (b) IKON and GE have restrained, suppressed and eliminated actual and potential competition and foreclosed plaintiffs and other competitors; (d) the public has been denied the benefits of unrestricted competition in free and open markets; (e) plaintiffs have been precluded from obtaining and performing substantial contracts; (f) consumers are paying supracompetitive prices; and (g) output and efficiency have declined.

[36] 108. The actions of IKON and GE and agreements with customers subject to the IKON Contracts and IKON Amendments are unlawful as unreasonable exclusive dealing arrangements under Section 1 of the Sherman Act (15 U.S.C. § 1) in the said relevant markets.

Wherefore, plaintiffs pray judgment against defendants IKON and GE as set forth below.

C. Third Claim for Relief
(Against IKON and GE)
Per Se Tying Arrangements
(Section 1 of the Sherman Act, 15 U.S.C. § 1)

109. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 108 inclusive, above, to the extent they are consistent with the facts

alleged in this cause of action with the same force and effect as if said paragraphs were herein set forth in full.

110. IKON and GE condition the sale of replacement Copier Equipment for IKON and GE customers having Flexed IKON Contracts ("the "tying product") upon a the customer's purchase of Copier Service for that equipment (the "tied product") or at least on the owner's not being able to buy Copier Service from a competitor.

111. IKON and GE, as set out herein, have complete economic power over the customer in the tying product – Copier Equipment subject to Flexed IKON Contracts. This market power allows IKON and GE to affect a substantial amount of commerce in the market for the tied product – Copier Service for that equipment.

112. Replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts is indispensable to owners or users of that equipment. There are no reasonable, adequate or economic practicable substitutes for the tying product, because of IKON and GE's use of their Market Imperfections, Unfair Business Practices and Flexed IKON Contracts. The barriers to creating such substitutes are substantial and entry into the market is not practicable. Few competitors have been able to enter this market.

113. The tying product and the tied product are separate and distinct from one another. Replacement Copier Equipment and replacement Copier Service for a particular brand of equipment are widely and publicly recognized as distinct and separate products. Many consumers [37] would prefer to purchase each product independently of the other. Many consumers do.

114. IKON's and GE's tying arrangement has been successful. IKON and GE have been able to force purchasers of the tying product who are locked in at the end of the original term of the cost-per-copy lease by the Flexed IKON Contract to buy the tied product from IKON and GE in nearly 100% of all cases. If IKON and GE had not imposed the tie-in arrangements many of these purchasers would have bought the tied product from plaintiffs or another competitor of IKON and GE.

115. By imposing the tying arrangement, IKON and GE have harmed competition in the market for the tied product and foreclosed a substantial volume of commerce in the market for the tied product.

116. IKON's and GE's tying arrangement has caused injury to both buyers and sellers in the market for the tied product. (a) Purchasers of Copier Equipment from IKON and GE on Flexed IKON Contracts have been wrongfully forced to buy Copier Service from IKON and GE. (b) Prices for the tied product have been higher than they would be in a

competitive market. (c) Supply of the tied product has been lower than it would be in a competitive market.

117. IKON and GE did not impose the tie for legitimate business reasons or purposes. In any case, this arrangement imposes excessive burdens and any legitimate business purposes could be accomplished by less restrictive means.

118. By reason of IKON's and GE's aforesaid unlawful tying arrangement and as a direct and proximate result of such tying arrangement, plaintiffs have lost sales, profits and the value of their businesses. Plaintiffs have and will continue to suffer irreparable harm through the loss of their trade and business, and the public will be damaged by: (a) the weakening or elimination of plaintiffs and others in the market for Copier Service; and (b) the weakening or elimination of plaintiffs others in the market for replacement Copier Equipment.

119. IKON and IOS Capital's tying arrangement constitutes a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

Wherefore, plaintiffs pray judgment against defendants IKON and GE as set forth below.

[38] **D. Fourth Claim for Relief**
(Against IKON and GE)
Rule of Reason Tying
(Section 1 of the Sherman Act, 15 U.S.C. § 1)

120. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 119 inclusive, above, to the extent they are consistent with the facts alleged in this cause of action, with the same force and effect as if said paragraphs were herein set forth in full.

121. Even if IKON's and GE's tying arrangement is not a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, IKON's and GE's tying arrangement of replacement Copier Equipment for IKON customers with Flexed IKON Contracts, tied to Copier Service unreasonably restrains competition in the tied product market and constitutes a rule of reason violation of Section of the Sherman Act, 15, U.S.C. § 1.

Wherefore, plaintiffs pray judgment against defendants IKON and GE as set forth below.

E. Fifth Claim for Relief
(Against IKON and GE)
Combination and Conspiracy to Monopolization
(Section 2 of the Sherman Act, 15 U.S.C. § 2)

122. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 121 inclusive, above, to the extent they are consistent with the facts alleged in this cause of action with the same force and

effect as if said paragraphs were herein set forth in full.

123. IKON and GE, which have combined and conspired, as set forth above, have over 80% market share of the relevant markets for: (a) the sale of replacement Copier Equipment for IKON customers with Flexed IKON Contracts; and (b) the sale of Copier Service for IKON customers with Flexed IKON Contracts. IKON and GE have the power to control prices and to exclude competition in these markets.

124. The barriers to entry for competitors, including plaintiffs, to get into these markets are high. These barriers to entry include, but are not limited to, the use by IKON, IOS Capital and GE of the Market Imperfections, the Unfair Business Practices, the IKON Contracts, the Ikon Amendments and the Flexed IKON Contracts, as set out above. Few competitors have entered [39] these markets. Compared to other large copier dealers, like Danka, and to industry norms, IKON has been able to exclude competition in these markets to a considerably greater degree.

125. The prices IKON and GE obtain in these markets are highly supracompetitive. These supracompetitive prices have not caused appreciable numbers of customers to switch from IKON to competitive vendors over the past few years. The supracompetitive prices have not caused new entry or the switching of resources of competitors into these markets.

126. The purposes and effects of the actions of IKON and GE in obtaining Flexed IKON Contracts and administering them, as set out above, were to monopolize and to maintain a monopoly in these relevant markets.

127. These actions of IKON and GE, taken to monopolize and to maintain a monopoly in these markets, are not justified by plausible arguments that these actions were intended to increase output, enhance the efficiency of, lower prices of or make more competitive these markets or any other markets. These actions in fact injure competition and consumers, decrease output, raise prices and decrease economic efficiency in said markets. The likelihood of anticompetitive effects from such actions is clear and the possibility of procompetitive effects is remote.

128. IKON and GE did not obtain the Flexed IKON Contracts and administer them, as set out above, for legitimate business reasons or purposes. In any case, IKON's and GE's obtaining of the "flexed" cost per copy agreements and administration of them, as set out above, imposes excessive burdens and any legitimate business purposes could be accomplished by less restrictive means.

129. By reason of IKON's and GE's actions in obtaining the Flexed IKON Contracts and administering them, as set out above, plaintiffs have lost sales, profits and the value of their businesses. Plaintiffs have and will continue to suffer irreparable harm through the loss of their trade and business, and the

public will be damaged by: (a) the weakening or elimination of competition in these markets; and (b) the elimination of choices for consumers in these markets; (c) the payment of supracompetitive prices for the goods and services in these markets; and (d) the decreasing of output and efficiency in these markets.

130. IKON's and GE's actions in obtaining Flexed IKON Contracts and administering [40] them, as set out above, constitute an unlawful monopolization and maintenance of a monopoly and unlawful combinations and conspiracies to monopolize pursuant to Section 2 of the Sherman Act, 15 U.S.C. § 2.

Wherefore, plaintiffs pray judgment against defendants IKON and GE as set forth below.

F. Sixth Claim for Relief
(Against IKON and GE)
Attempted Monopolization
(Section 2 of the Sherman Act, 15 U.S.C. § 2)

131. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 130 inclusive, above, to the extent they are consistent with the facts alleged in this cause of action with the same force and effect as if said paragraphs were herein set forth in full.

132. The aforesaid actions of IKON and GE were engaged in with the purpose and intent to injure, suppress, destroy and irreparably harm plaintiffs and

other competitors as vital competitors in the markets for: (a) the sale of replacement Copier Equipment for IKON customers with Flexed IKON Contracts; and (b) the sale of Copier Service for IKON customers with Flexed IKON Contracts. and, to control prices and to unlawfully monopolize trade and commerce in these markets.

133. Said actions of IKON and GE have created and create a dangerous probability that IKON and GE will succeed in injuring, suppressing, destroying and irreparably harming plaintiffs and others as vital competitors in these markets and achieving a monopoly in these markets.

134. These actions of IKON are not justified by plausible arguments that these actions were intended to increase output, enhance the efficiency of, lower prices of or make more competitive these markets or other related markets. These actions in fact injure competition and consumers, decrease output, raise prices and decrease economic efficiency in said markets. The likelihood of anticompetitive effects from such actions is clear and the possibility of procompetitive effects is remote.

135. By reason of IKON's and GE's aforesaid actions and as a direct and proximate result of such actions, plaintiffs have lost sales, profits and the value of their businesses. Plaintiffs [41] have and will continue to suffer irreparable harm through the loss of their trade and business, and the public will be damaged by: (a) the weakening or elimination of

competition in these markets; and (b) the elimination of choices for consumers in these markets; (c) the payment of supracompetitive prices for the goods and services in these markets and (d) the decreasing of output and efficiency in these markets.

136. IKON's and GE's aforesaid actions constitute an unlawful attempt to monopolize the relevant markets for:(a) the sale of replacement Copier Equipment for IKON customers with Flexed IKON Contracts; and (b) the sale of Copier Service for IKON customers with Flexed IKON Contracts, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

Wherefore, plaintiffs pray judgment against defendants IKON and GE as set forth below.

G. Seventh Claim for Relief
(Against IKON and GE)
Lanham Act
(15 U.S.C. § 1125(a)(1)(B))

137. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 136 inclusive, above, to the extent they are consistent with the facts alleged in this cause of action with the same force and effect as if said paragraphs were herein set forth in full.

138. IKON and GE have made a false and misleading statements, including descriptions of fact and representations of fact in connection with its goods and services. These statements were made in

commercial advertising and promotion of those goods and services to all IKON and GE customers and were made in interstate commerce. They were made by the broad dissemination of pieces of promotional literature to thousands of accounts by IKON's and GE's over 2,000 sales representatives and employees.

139. These false and misleading statements were much more specific that mere "puffing" and included the following statements: (a) that IKON and GE would deliver 'flexibility' in their 'cost-per-copy' contracts and that they would lower copying costs for customers; (b) that IKON and GE would deliver 95% up-time service in their IKON Contracts; (c) that original IKON Contracts were intended by IKON to be for a fixed term of sixty (60) months and would expire at [42] the end of that term; (d) that IKON Amendments for sixty (60) months applied only to the changes on the Amendment, not to the entire fleet of IKON or GE Copier Equipment of the customer; and (e) that IKON's "flexing" practices had been declared legal by this Court in its opinion of December 23, 2004.

140. IKON and GE have made these false and misleading statements deliberately and with the intention to deceive customers. These statements actually deceived or had the tendency to deceive a substantial segment of IKON and GE customers. The deception was material, in that it was likely to influence and did influence the purchasing decision of those IKON and GE customers.

141. Plaintiffs have been and are likely to be injured as a result of IKON's and GE's false and misleading statements both by the direct diversion of sales from plaintiffs to IKON and GE and by a lessening of goodwill associated with plaintiffs' products.

142. IKON has thereby violated Section 43(a)(1)(b) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B).

Wherefore, plaintiffs pray judgment against defendants IKON and GE as set forth below.

H. Eighth Claim for Relief
(Against IKON and GE)
R.I.C.O.
(18 U.S.C. § 1961 et. seq)

143. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 142 inclusive, above, to the extent they are consistent with the facts alleged in this cause of action, with the same force and effect as if said paragraphs were herein set forth in full.

144. Plaintiffs incorporate herein by reference the answers to Plaintiffs' RICO Statement which is being filed herewith and is appended to this First Amended Complaint as **Exhibit C.**

145. At all material times herein, IKON and GE were associated with an enterprise engaged in activities which affected interstate commerce. The defendants, IKON and GE, are persons distinct from the

enterprise and are members of the group comprising the enterprise.

146. The enterprise consists of the association in fact of separate legal entities which [43] provide IKON customers with "Copier Equipment" (copiers, printers and facsimile equipment and related servers, network equipment, accessories and software); "Copier Service" (supplies, parts and service); "IKON Contracts" (equipment financing for Copier Equipment bundled with supplies, parts and service) and administration of the IKON Contracts. These separate legal entities include, IKON, Office Solutions, Inc. which sells the Copier Equipment and provides the Copier Service; the Copier Equipment manufacturers (Canon, USA, Inc., Rich Corporation, Sabin Corporation, One North America, Inc., Hewlett Packard Company) which provide the Copier Equipment; the entities which provide financing to buy the Copier Equipment from the manufacturers (IOS Capital, Inc., General Electric Capital Corporation); and the entities which assist in administering the IKON Contracts (Aspirin, Inc., Duane Morris, LLP, Barry & Randolph, LLP).

147. The enterprise had an ongoing organization with a framework for making decisions, functioned as a continuing unit and had ascertainable structure and systems of authority guiding its operations, separate and apart from the pattern of racketeering in which the enterprise engaged. The structure of the "enterprise" consists of contracts by and between the legal entities associated in fact, which

contracts are for the purpose of providing IKON customers with Copier Equipment, Copier Service and IKON Contracts. These contracts consist of distributorship agreements between IKON and Canon, USA, Inc., Ricoh Corporation, Savin Corporation, Oce North America, Inc. and Hewlett Packard Company; the agreement between IKON and GE of March 31, 2004 under which GE provides lease financing and administration of financing for Copier Equipment and Copier Service under IKON Contracts and funds and services future lease originations of IKON on a preferred basis; the agreements under which IKON provides credit information to Experian, Inc. f/k/a TRW and other credit reporting agencies; and the retainer agreements with Dane Morris LLP, Barry & Randolph LLP and other law firms under which IKON contracts for legal services to enforce IKON Contracts. These contracts provide the mechanism for decision making and for controlling and directing the affairs of the "enterprise" on an ongoing basis. The "enterprise" thereby had a continuity of structure and personnel (as witnessed, for example, by GE's acquisition of IOS Capital, Inc. on March 31, 2004 in which GE took over all of [44] the some 450 personnel of IOS Capital which administer IKON Contracts.)

148. The common and shared purpose of the "enterprise" is to provide IKON customers with Copier Equipment, Copier Service and IKON Contracts, to administer those IKON Contracts and to try to renew or extend those IKON Contracts. The function

and course of conduct of the "enterprise" is to provide the IKON customers with Copier Equipment, Copier Service and IKON Contracts, to administer those IKON Contracts and to try to renew or extend those IKON Contracts. IKON and GE make proposals and take orders from customers for Copier Equipment and Copier Service. These are usually customers with existing IKON Contracts (whether owned by IKON or GE). These orders are filled by the purchase of Copier Equipment from a manufacturer, usually Canon, USA, Inc., Rich Corporation, Sabin Corporation, Oce North America, Inc. or Hewlett Packard Company. Money to finance the IKON Contract was formerly provided by IOS Capital but now is provided by GE, with this money generally raised through the sale of debt securities. IKON purchases the parts and supplies to provide the Copier Service, again usually from the Copier Equipment manufacturer and supplies the labor to perform the Copier Service. The IKON Contracts are centrally administered (monthly billings, sales taxes, property taxes, insurance, generally from the Macon, Georgia facility owned by IOS Capital until March 31, 2004 when GE bought the facility and took over the employees, although some administration functions are performed by IKON and GE personnel in various locations throughout the United States. Both IKON and GE personnel are involved in trying to renew and extend the IKON Contracts.

149. The pattern of racketeering activity alleged is separate from the enterprise and differs from

the usual and daily activities of the enterprise. The usual and daily activities of the enterprise, to provide IKON customers with Copier Equipment, Copier Service and IKON Contracts, to administer those IKON Contracts and to try to renew or extend those IKON Contracts, described above, differ from the pattern of racketeering activity in general because each of these activities can be and are, within the enterprise, conducted legally.

150. Specifically, some IKON customers are provided with Copier Equipment, Copier Service, IKON Contracts, administration of those IKON Contracts and the renewal or extending of [45] those IKON Contracts, without being subject to "flexing" and to the other Unfair Business Practices which constitute the pattern of racketeering activity. Only in some circumstances are IKON customers fraudulently induced to sign IKON Contracts and IKON Amendments, and, thereafter, subject to the other Unfair Business Practices which may accompany a Flexed IKON Contract.

151. The enterprise receives substantial financial benefits from the alleged pattern of racketeering. The billings for Copier Equipment for Flexed IKON Contracts, beyond the original term of the IKON Contract have considerably higher margins and profit than the standard in the copier industry. The Copier Service for Flexed IKON Contracts, extending beyond the original term of the IKON Contract is not subject to competitive bids and the ensuing lower prices and lower margins and profits. The IKON customers who

are locked-in by Flexed IKON Contracts are considerably less likely to switch to competitors, resulting in renewals at a higher rate (and with higher margins and profits) than the standards in the copier industry and in increased business (with the accompanying margins and profits) for the enterprise and its members in providing Copier Equipment, Copier Service, contracts, financing and administration of such contracts. Where IKON customers choose to terminate the Flexed IKON Contract, the buy-out costs and lease end charges associated with the Unfair Business Practices produce huge margins and profits.

152. The "predicate acts" which constitute the alleged "pattern of racketeering activity" pursuant to 18 U.S.C. § 1661(5) involve two categories of "racketeering activity" set out in 18 U.S.C. § 1661(1): (1) "act[s] . . . indictable under . . . title 18, United States Code:. . . . section 1341 (relating to mail fraud)"; and (2) act[s] . . . indictable under . . . title 18, United States Code:. . . . section 1343 (relating to wire fraud)."

153. Each of the acts indictable under 18 U.S.C. § 1341 (mail fraud), the specifics of which are set out below, involved IKON and GE knowingly causing the use of the mails or private carrier services with the specific intent and "for the purpose of executing" a "scheme or artifice to defraud" in that each was material and incidental to an essential element of the scheme. The "scheme to defraud" included IKON and GE's use of dishonest methods and schemes, as set

out above, to deprive Plaintiffs and customers, by trick, deceit, chicane or overreaching, of money, [46] property and the right of honest services.

154. Each of the acts indictable under 18 U.S.C. § 1342 (wire fraud), the specifics of which are set out below, involved IKON and GE knowingly causing the use of wire, radio or televison communication to transmit writings with the specific intent and "for the purpose of executing" a "scheme or artifice to defraud" in that each was material and incidental to an essential element of the scheme. The "scheme to defraud" included IKON and GE's use of dishonest methods and schemes, as set out above in the, to deprive Plaintiffs and customers, by trick, deceit, chicane or overreaching, of money, property and the right of honest services.

155. The time, place and contents of the alleged misrepresentations which constituted mail and wire fraud constituting predicate offenses are as follows.

	Time	By Whom and To Whom Made	Place Made and Contents
i.	06/06/02	Mick Mullen (IKON) Sherri Miller	Mick Mullen sent by facsimile to Sherry Miller of the First Assembly of God, Fremont, California a letter and fraudulent buy-out demand. The buy-out demand was based on fraudulently

			obtained IKON Amendments
ii.	07/02/02	Louise Candolesas (IKON) Sherri Miller	Louise Candesas sent to Sherry Miller of the First Assembly of God, Fremont, California, a facsimile with a fraudulent buy-out demand. The buy-out demand was based on fraudulently obtained IKON Amendments.
iii.	10/30/03	Lisa Begley (IKON) Katy Dubnoff	Lisa Begley sent to Katy Dubnoff of Erin Engineering & Research, Walnut Creek California, a fraudulent buy-out demand. The buy-out demand was based on fraudulently obtained IKON Amendments and fraudulently misrepresented that it was the sum of stream of payment owing, unfunded principle (sic) and current FMV.
iv.	02/09/04	Ray Rivera (IKON)	Ray Rivera e-mailed to Kathy Doud of

		Kathy Doud	Ridgecrest Regional Hospital, Ridgecrest, California, a fraudulent $471,000 buy-out demand which was fraudulent in that: (a) it was based on [47] fraudulently obtained Flexed IKON Amendments; (b) it was based on an IKON forgery on an IKON Amendment; (c) it covered equipment IKON did not have at the Hospital; and (d) it fraudulently added a six (6) month delay in IKON signing an Amendment.
v.	03/29/04	Janelle Wisner (IKON) Randy Kohl	Janelle Wisner sent to Randy Kohl of Pacific Coast Producers, Woodlands, California, by facsimile a fraudulent buy-out quote. This buy-out quote was fraudulent in that it was based on fraudulently obtained IKON Amendments.

vi.	05/19/04	Jeanie Jacks (GE) Carolyn Fisher	Jeanie Jacks sent to Carolyn Fisher at Galgon Industries, Fremont California a fraudulent buy-out quote. This buy-out quote was fraudulent in that it was based on fraudulently obtained IKON Amendments.
vii.	08/04/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulently obtained and forged IKON Amendments alleged to support the $471,000 buy-out demand.
viii.	08/06/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David. Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations

			were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
ix.	08/16/04	Kelly Mitchell (GE) Kathy Doud	Kelly Mitchell sent a facsimile to Kathy Doud of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier [48] Contract. The misrepresentations were fraudulent in that they covered equipment that IKON did not have at the Hospital.

x.	08/16/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital,, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that:(a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xi.	08/20/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest,

			California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xii.	08/20/04	Ken Griffith (IKON) Kathy Doud	Ken Griffith called Kathy Doud of Ridgecrest Regional Hospital with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they

			were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
[49] xiii.	09/21/04	Ken Griffith (IKON) David Mechtenberg	Ken Griffith e-mailed to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, a fraudulently obtained IKON Amendment. The IKON Amendment had also been forged by IKON to change the dates of signing and to extend the term of the "flex" by 16 months
xiv.	09/21/04	Ken Griffith (IKON)	Ken Griffith sent an email to David Mechtenberg and

		David Mechtenberg	Kathy Doud of Ridgecrest Regional Hospital with fraudulent misrepresentations about monies owed by the Hospital. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKONAmendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xv.	10/12/04	Benjamin Hilton (GE) Jan Fanucchi	Benjamin Hilton sent by mail two fraudulent buy-out demands to Jan Fanucchi at Mediasmith, Inc., San Francisco, California. The buy-out demands were fraudulent in that

			they were based on a fraudulently obtained IKON Amendment, did not break out lease-end charges and did not represent actual charges for which the customer was liable.
xvi.	10/14/04	Benny Hilton (GE) Rhonda Miller	Benny Hilton sent to Rhonda Miller of Foundry Networks, Alviso, California, a fraudulent buy-out demand for $116,992.13 with fraudulent lease-end charges. The buy-out demand was fraudulent in that it was based on fraudulently obtained Flexed IKON Amendments. The lease -end charges were fraudulent in that they did not represent actual charges for which the customer was liable.

156. The sixteen (16) predicate acts are spread over nearly 2 ½ year and involve seven (7) different IKON and GE accounts and nine (9) different IKON and GE personnel. They all fall [50] precisely within the same pattern of racketeering activity and the alleged Unfair Practices of IKON and GE, as set out in greater detail above and in the First Amended Complaint. Specifically they include: (a)fraudulently obtaining Flexed IKON Contracts which the customers did not realize; (b) using the Flexed IKON Contracts as a means of obtaining fraudulent buy-out payments; (c) failing to break down buy-out demands to conceal the flexed contracts and fraudulent demands; (d) making fraudulent buy-out demands on top of the fraudulently obtained Flexed IKON Contracts, including those based on IKON forgeries or equipment customers did not have; and (e) making lease-end payment demands which did not represent actual charges for which the customer was liable. These had the same purposes. IKON and GE, in every instance, intended to obtain more monies from the customer than the customer thought they had contracted for or to prevent the customer from leaving IKON or GE. The methods utilized in committing the offenses were the same. The results were similar, IKON and GE either kept the customer, obtained large buy-outs or have large buy-out claims pending. The damages were of the same nature, with the customers paying more for their Copier Equipment and Copier Service or with the customer or competitor paying large buy-outs and lease-end payments to IKON or GE.

157. Beginning in or about 1996 and continuing through the present, IKON conspired with its outside counsel, including Barry & Randolph LLP, for such counsel to assist IKON in collecting sums alleged to be owing under fraudulently obtained Flexed IKON Contracts, including monthly billings and buy-out amounts and for fraudulent lease-end demands. The object of the conspiracy was to obtain payments from IKON customers for IKON Flexed Contracts and for lease-end demands which the customer did not agree to and for which the customer was not legally liable. IKON's outside counsel knew that the customer was not legally liable for the billings and demands for buy-outs which were based on the Flexed IKON Contracts and for such lease-end payments. IKON agreed with its outside counsel that it would make demands based on the fraudulent Flexed IKON Contracts and for the fraudulent lease-end payments. IKON engaged in overt acts in furtherance of the conspiracy, including sending fraudulent billings and demands for buy-outs based on the Flexed IKON Contracts and for lease-end payments and threats of litigation over non payment of such fraudulent billings and demands through the mail and over the wires. [51] IKON and its outside counsel knew through the repeated recurrence of the above actions, that they constituted a pattern of racketeering activity.

158. Beginning in or about March 2004 and continuing through the present, IKON conspired with GE to assist IKON in collecting sums alleged to be

owing under fraudulently obtained Flexed IKON Contracts, including monthly billings and buy-out amounts for fraudulent lease-end demands. The object of the conspiracy was to obtain payments from IKON customers, whether the leases were owned by IKON or GE, for Flexed IKON Contracts and for lease-end demands which the customer did not agree to and for which the customer was not legally liable. GE knew that the customer was not legally liable for the billings an demands for buy-outs which were based on the Flexed IKON Contracts for the such lease-end payments. IKON and GE agreed that they would both make demands based on the fraudulent Flexed IKON Contracts and for the fraudulent lease-end payments and would work together to renew the IKON customer's contract for Copier Equipment and Copier Service or to collect the billings, buy-outs and lease-end payments. Both IKON and GE engaged in overt acts in furtherance of the conspiracy including sending fraudulent billings and demands for buy-outs based on the Flexed IKON Contracts and for lease-end payments and threats of litigation over non payment of such fraudulent billings and demands through the mail and over the wires. IKON and GE knew through the repeated recurrence of the above actions, that they constituted a pattern of racketeering activity.

159. Plaintiffs suffered direct injury to their businesses and property by reason of the violations of § 1962 by IKON and GE in the following respects. (1) Plaintiffs paid monies directly to IKON and GE based

on fraudulently obtained IKON Contracts and IKON Amendments and Unfair Business Practices which form the basis for the alleged violations of § 1962. (2) Plaintiffs were foreclosed from specific accounts based on fraudulently obtained IKON Contracts and IKON Amendments and Unfair Business Practices which form the basis for the alleged violations of § 1962.

160. In each of these two (2) respects: (a) Plaintiffs' injuries were the direct result of the alleged violations of §1962 and not derivative of injury to another party since the monies paid by Plaintiffs directly to IKON and the foreclosure were based on fraudulently obtained IKON [52] Contracts and IKON Amendments and Unfair Business Practices which form the basis for the alleged violations of § 1962; (b) Plaintiff competitors were the intended target of the alleged violations of § 1962, both as to the exorbitant "buy-out" payments and foreclosure because the IKON's "Image Management Plus Flex Program" "Field Training Manual" states that "the sales representative's ***primary objective*** in flexing is ***to extend the term beyond the original expiration date*** [of the IKON Contract]." (Emphasis supplied.) This extension, the Manual states, "***creates separation from the competition*** at the end of the original Agreement term . . [because] . . . the IKON sales upgrade number is based upon the original expiration date of the Image Management PLUS Agreement, while ***the competition's cost to upgrade includes all term extension periods***" and that the object of the "flex" is to make it "***virtually***

impossible for competition to penetrate [the customer's] account." (Emphasis supplied.) (c) These types of injury were reasonably foreseeable consequences of the alleged violations of § 1962 because IKON itself foresaw them as the intended and desired consequence. (d) There are no independent causes which have intervened between the alleged violations of § 1962 and the injury, because the damages are an immediate consequence of, and directly calculated from the "flex."

161. The payments made to IKON and GE on Flexed IKON Contracts by plaintiffs and which form the basis for damages that IKON and GE are liable include the following:

Entity With Flexed Contract	Date Payment Made	Payment Made To	Amount
Delaney, Mitchell & Lander, Cas, San Francisco, California	12/04/00	IKON	$23,122
Erin Engineering, Walnut Creek, California	01/21/04	IKON	$14,678
First Assembly of God, Fremont, California	12/30/02	IKON	$101,041
Fondly Networks, Alviso, California	10/26/04	GE	$130,608
Kathryn Delmar Burke School	09/10/02	IKON	$28,459

Mediasmith, Inc., San Francisco, California	11/05/04	GE	$14,404
[53] Mektec International, San Jose, California	06/12/03	IKON	$15, 167
Seton Medical Center, Daly City, California	11/19/02	IKON	$217,578
Seton Hospital, Daly City, California	05/30/02	IKON	$36,899

162. The damages for which IKON and for which GE are liable, based on plaintiffs being foreclosed from the specific accounts include the following.

Name of Account	Date of Foreclosure
J.H. Kelly, Vancouver, Washington	05/10/04
Galgon Industries, Fremont, California	05/18/04
Pacific Coast Producers, Woodland, California	03/16/04
Cascadia Behavioral Health Care, Portland, Oregon	04/28/04
California Nurses Association, Oakland, California	03/29/02
Corovan, Poway, California	11/22/04
Ilx Resorts, Phoenix, Arizona	08/11/04
Northern California Institute for Research & Education (Veterans Administration)	11/03

Folger, Levin & Kahn, San Francisco, California	11/22/04
Jackson & Wallace, San Francisco, California	03/09/04

163. Based upon the foregoing, IKON and GE have violated 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d).

164. As a direct and proximate result of defendant IKON's and GE's activities which were violative of the Racketeer Influenced Corrupt Organizations Act, plaintiffs have suffered substantial loss and damages to their property. This loss entitles plaintiffs to recover treble [54] damages against defendants IKON and GE and costs of suit, including reasonable attorney's fees, pursuant to 18 U.S.C. Section 1964(c).

Wherefore, plaintiffs pray judgment against defendants IKON and GE as set forth below.

VIII. Prayer for Relief

Plaintiffs respectfully request that this Court order, adjudge and decree:

A. Defendants IKON's and GE's conduct, as alleged, unlawful under Section 1 of the Sherman Act (15 U.S.C. § 1);

B. Defendants IKON's and GE's conduct, as alleged, unlawful under Section 2 of the Sherman Act (15 U.S.C. § 2);

C. Defendants IKON's and GE's conduct, as alleged, unlawful under Section 23(a) of the Lanham Act (15 U.S.C. § 1125(a));

D. Defendants IKON's and GE's conduct, as alleged, violated 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d) and was unlawful under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*;

E. Defendants IKON and GE as well as their officers, agents, servants employees and attorneys and those persons in active concert or participation with them who shall receive actual notice of the Court's injunction, be enjoined preliminarily and permanently from continued engagement in those acts, forms of conduct and practices found to be illegal:

F. Plaintiffs, and each of them, recover from defendants IKON and GE, jointly and severally, threefold their actual damages sustained as a result of said defendants' federal antitrust and RICO violations;

G. Plaintiffs and each of them, recover from defendant IKON and GE, jointly and severally, their costs and reasonable attorney fees as provided by the Clayton Act, the Lanham Act and RICO;

H. Plaintiffs, and each of them recover from defendants IKON and GE, jointly severally, prejudgment and post-judgment interest on any award; and

I. Plaintiffs, and each of them, and other who have been injured by defendants' [55] unlawful

actions be awarded such other and further relief in law or in equity as the Court may deem just and proper in the premises.

Dated: February 14, 2005

HENNEFER & WOOD

By: /s/ James A. Hennefer
James A. Hennefer

Attorneys for Plaintiffs

[56] DEMAND FOR JURY TRIAL

Pursuant to the Seventh Amendment to the Constitution of the United States, Rule 38(a) and (b) of the Federal Rules of Civil Procedure, and similar provisions of any state of the United States that apply, plaintiffs demand a trial by jury of all issues triable of right by jury.

Dated: February 14, 2005

HENNEFER & WOOD

By: /s/ James A. Hennefer
James A. Hennefer

Attorneys for Plaintiffs

EXHIBIT A

IKON Office Solutions **Images Plus Program Addendum**

Customer (Location)	**Customer (Billing address, if different)**
Full Legal Name	Full Legal Name
Address	Address
City County	City County
State Zip	State Zip

Term: _____ **Months** **Original Agreement Number:** _____

Program Change

☐ Equipment Change ☐ Image Volume Change ☐ Both

Quantity	Make/Model	Meter	Serial #
Add	Add	Beginning	Add
Delete	Delete	Ending	Delete

Amended Billing

Cost per Image	Guaranteed Minimum Monthly Volume	Cost of Additional Images	Minimum Monthly Payment
From	From	From	From
To	To	To	To

Payment Due: ☐ Monthly ☐ Quarterly

Meter Reading/Billing for Additional Images: ☐ Monthly ☐ Other: _____.

Additional Provision

You are applying to us to amend the Original Agreement as described above. The amended term will commence on the customer acceptance date indicated below. Billing for the amended amount will begin on the next cycle date of this agreement. All original guarantees and terms and conditions of the above referenced Agreement(s) are still enforced and binding by each party.

Signatures

Authorized Signer's Printed Name	Approved by IOS Capital:
Title	Name
Date	Title
Authorized Signer's Signature	Signature

EXHIBIT B

Copy Management Program Addendum [LOGO]

CUSTOMER INFORMATION		
Customer Name		
Original Agreement Number	Schedule Number	
Address		
City	State	Zip

EQUIPMENT CHANGE					
	Equipment Change		Copy Volume Change		Both

	QUANTITY	MAKE/MODEL	SERIAL #	BEGINNING/ ENDING METER
Add				
Delete				

AMENDED BILLING			
Cost per Copy	Guaranteed Monthly Volume	Copy Period	Term

ADDITIONAL PROVISIONS:

This addendum amends the original agreement as described above. These changes will take effect on the next scheduled billing date or an interim invoice will be generated covering the period up to the next billing date. The number entered into the term box above indicates the number of months the entire amended agreement now has left to run, starting on the next billing date. Depending on the number of months entered, this addendum may extend the length of the original agreement. All original guarantees, terms, and conditions of the original agreement are still valid and binding to each party unless specifically modified in this addendum.

CUSTOMER ACCEPTANCE	
Authorized Signer's Printed Name	Approved by IKON Office Solutions
Title	Name
Date	Title
Authorized Signer's Signature	Signature

EXHIBIT C

Maxwell M. Blecher, Esq. (SBN 026202)
James Robert Noblin, Esq. (SBN 114442)
Matthew E. Hess (SBN 214732)
BLECHER & COLLINS, P.C.
611 West Sixth Street, 20th Floor
Los Angeles, CA 90017
Telephone: (213) 622-4222
Facsimile: (213) 689 1944

James A. Hennefer (SBN 059490)
HENNEFER & WOOD
425 California Street, 19th Floor
San Francisco, CA 94104-2296
Telephone: (415) 421-6100
Facsimile: (415) 421-1815

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NEWCAL INDUSTRIES, INC., a California Corporation; CPO, LTD., a California Corporation; PINNACLE DOCUMENT SYSTEMS, INC., a California Corporation; PACIFIC OFFICE AUTOMATION, INC., an Oregon Corporation; and KEARNS BUSINESS SOLUTIONS, INC., a South Carolina Corporation,	) CIVIL NO. C 04 2776 FMS **PLAINTIFF'S RICO STATEMENT**

Plaintiffs)
)
vs.)
)
IKON OFFICE SOLUTIONS,)
INC., an Ohio Corporation;)
and GENERAL ELECTRIC)
CAPITAL CORPORATION,)
a Delaware Corporation,)
)
Defendants)
)

Plaintiffs herein, pursuant to the Court's "Order Requiring Filing of RICO Statement" filed December 23, 2004 and its order of January 24, 2005, hereby submit their responses to those orders and in conjunction with their First Amended Complaint. The responses are made as a result of reasonable inquiry available to plaintiffs at this time. Given the broad nature of defendants' fraudulent conduct and the concealment of that conduct by defendants, because no discovery has been available to plaintiffs up to this point, because defendant IKON has engaged in a course of aggressive and repeated litigation against parties for their alleged disclosure of confidential action and because IKON has sealed files or required confidentiality of parties in prior litigation involving these issues, the information available to plaintiffs at this time is limited. More complete information will only become available to plaintiffs through discovery. Plaintiffs therefore reserve the right to amend this statement after discovery.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

RESPONSE

The alleged unlawful conduct is in violation of 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

RESPONSE

The two defendants are: **(a)** IKON Office Solutions, Inc. ("IKON") and **(b)** General Electric Capital Corporation, d/b/a "IKON Financial Services" ("GE").

(a) The **misconduct** of IKON and GE consists of the following.

Background

IKON sells bundled "cost-per-copy" and other lease/rental contracts ("IKON Contracts"). These IKON Contracts are for copiers, printers and facsimile equipment and for related servers, network equipment, accessories and software ("Copier Equipment"). The IKON Contracts provide businesses with equipment financing for their Copier Equipment. This is bundled with supplies, parts and service ("Copier Service"). The IKON Contracts are for fixed periods, typically for five (5) years. After obtaining the IKON Contract, for a high percentage of their customers,

IKON obtained one or more "amendments" or "addenda" to the IKON Contracts ("IKON Amendments").

Fraudulent Conduct

The IKON Contracts themselves are often obtained under false pretenses – principally by selling the contracts based on their alleged flexibility, without disclosing IKON's purpose and intent to fraudulently exact, as a price for flexibility, lengthy extensions of all IKON equipment under contract with the customer. IKON Amendments, also known as "flexes," extended IKON Contracts well beyond their original term ("Flexed IKON Contracts"). IKON Amendments were specifically designed to deceive the customer and IKON trained its sales persons when "flexing" a customer in how to actively deceive the customer. IKON refused the requests of its own employees to include standardized written disclosures to the customers about the Amendment.

IKON used "Unfair Business Practices" as set out in the First Amended Complaint to get consumers into Flexed IKON Contracts. These included: (a) using deceptive forms for the IKON Amendments, in which forms prior explanatory language warning of the extensions has been intentionally omitted to deceive the consumer; (b) intentionally concealing and misrepresenting to the consumer the purpose of the IKON Amendments and the meaning of their terms; (c) using various "pretexts" like a "free trial" or swapping out poor-performing equipment in order to

get IKON Amendments signed; (d) refusing to break out payments for each individual machine; and (d) concealing from the customer and refusing to break out equipment payments and service payments.

"Unfair Business Practices" were applied not only by IKON to obtain Flexed IKON Contracts, but also by IKON, IOS Capital and GE to enforce such contracts after they were obtained and to leverage prior fraudulently obtained IKON Contracts or Amendments and collection threats to force the consumer into signing new IKON or GE Contracts or Amendments. After the Flexed IKON Contracts were obtained, additional Unfair Business Practices were used to prevent IKON customers from attempting to switch to Copier Equipment or Copier Service of competitors; to prevent them from challenging unlawfully obtained IKON Contracts and Flexed IKON Contracts; and to prevent them from challenging exorbitant "buy-out" or "lease end" payment demands.

The Unfair Business Practices applied by IKON, IOS Capital and GE, after Flexed IKON Contracts were obtained, involve an array of additional fraudulent and anticompetitive practices. These included: (a) delays in producing, and refusals to produce the IKON Contracts or IKON Amendments (of which the customers were often deprived at the time of signing); (b) refusals to give "buy out" amounts, to substantiate them or to break them down; (c) demands for buy-outs based on equipment the customer did not have; (d) demands for buy-outs based on forged or altered

documents; (e) denial of responsibility or the shifting of responsibility between IKON, IOS Capital and GE for problems with contracts, buy-outs, service or billing, depending on whom the customer was dealing with at the time; (f) billing for lease-end charges the customer was not legally liable for; (g) continued billing (with penalties) for unlawful charges; (h) cut-off of service to the subject equipment or equipment under different contracts from those in dispute; (i) making false adverse credit reports against the customer; (j) employing outside legal counsel to threaten or sue the customer without regard to the merits of such suit; (k) refusing to take back equipment as to which a contract was lawfully terminated – requiring the customer to leave it in place or to store it; (l) quoting unreasonable rigging and transport charges; and (m) threatening or billing additional large lease-end charges.

The **basis of liability** of both IKON and GE is that their misconduct, set out above, violates both: 18 U.S.C. § 1962(c); and 18 U.S.C. §§ 1962(d) as set out in the responses which follow.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

RESPONSE

There are no other alleged wrongdoers named in any cause of action in the First Amended Complaint, other than IKON and GE and their respective agents

who carried out the wrongdoing set out in response to paragraph 2 above and their respective agents whose conduct IKON and GE ratified.

4. List the alleged victims and state how each victim was allegedly injured.

RESPONSE

Each of the five plaintiffs was among the victims of the R.I.C.O. violations. These plaintiffs are: (1) NewCal Industries, Inc., a California corporation; (2) CPO, Ltd. Inc., a California corporation; (3) Pinnacle Document Systems, Inc. a California corporation; (4) Pacific Office Automation, Inc., an Oregon corporation; and (5) Kearns Business Solutions, Inc., a South Carolina corporation (jointly "Plaintiffs"). While customers of IKON and GE were also victims, they are not suing and damages on their behalf are not being sought against IKON and GE in this action.

Plaintiffs suffered direct injury to their businesses and property by reason of the violations of § 1962 by IKON and GE in the following respects. (1) Plaintiffs paid monies directly to IKON and GE based on fraudulently obtained IKON Contracts and IKON Amendments and Unfair Business Practices which form the basis for the alleged violations of § 1962. (See, Response to Question No. 2) (2) Plaintiffs were foreclosed from specific accounts based on fraudulently obtained IKON Contracts and IKON Amendments and Unfair Business Practices which form

the basis for the alleged violations of § 1962. (See, Response to Question No. 2) In each of these two (2) respects: (a) Plaintiffs' injuries were the direct result of the alleged violations of §1962 and not derivative of injury to another party since the monies paid by Plaintiffs directly to IKON and the foreclosure were based on fraudulently obtained IKON Contracts and IKON Amendments and Unfair Business Practices which form the basis for the alleged violations of § 1962; (b) Plaintiff competitors were the intended target of the alleged violations of § 1962, both as to the exorbitant "buy-out" payments and foreclosure because the IKON's "Image Management Plus Flex Program" "Field Training Manual" states that "the sales representative's ***primary objective*** in flexing is ***to extend the term beyond the original expiration date*** [of the IKON Contract]." (Emphasis supplied.) This extension, the Manual states, "***creates separation from the competition*** at the end of the original Agreement term . . [because] . . . the IKON sales upgrade number is based upon the original expiration date of the Image Management PLUS Agreement, while ***the competition's cost to upgrade includes all term extension periods***" and that the object of the "flex" is to make it "***virtually impossible for competition to penetrate [the customer's] account***." (Emphasis supplied.) (c) These types of injury were reasonably foreseeable consequences of the alleged violations of § 1962 because IKON itself foresaw them as the intended and desired consequence. (d) There are no independent causes which have intervened between the

alleged violations of § 1962 and the injury, because the damages are an immediate consequence of, and directly calculated from the "flex."

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:

a. List the alleged predicate acts and the specific statutes which were allegedly violated;

RESPONSE

a. The alleged "predicate acts" which constitute the alleged "pattern of racketeering activity" pursuant to 18 U.S.C. § 1661(5) involve two categories of "racketeering activity" set out in 18 U.S.C. § 1661(1): (1) "act[s] . . . indictable under . . . title 18, United States Code:. . . . section 1341 (relating to mail fraud)"; and (2) act[s] . . . indictable under . . . title 18, United States Code:. . . . section 1343 (relating to wire fraud)."

Each of the acts indictable under 18 U.S.C. § 1341 (mail fraud), the specifics of which are set out below in the Response to Question 5.b., involved IKON and GE knowingly causing the use of the mails or private carrier services with the specific intent and "for the purpose of executing" a "scheme or artifice to

defraud" in that each was material and incidental to an essential element of the scheme. The "scheme to defraud" included IKON and GE's use of dishonest methods and schemes, as set out above in the Response to Question 2.a. and 2.b., to deprive Plaintiffs and customers, by trick, deceit, chicane or overreaching, of money, property and the right of honest services.

Each of the acts indictable under 18 U.S.C. § 1342 (wire fraud), the specifics of which are set out below in the Response to Question 5.b., involved IKON and GE knowingly causing the use of wire, radio or televison communication to transmit writings with the specific intent and "for the purpose of executing" a "scheme or artifice to defraud" in that each was material and incidental to an essential element of the scheme. The "scheme to defraud" included IKON and GE's use of dishonest methods and schemes, as set out above in the Response to Question 2.a. and 2.b., to deprive Plaintiffs and customers, by trick, deceit, chicane or overreaching, of money, property and the right of honest services.

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

RESPONSE

b.

Date	Participants	Description of Facts Surrounding Predicate Act
i. 06/06/02	Mick Mullen (IKON) Sherry Miller	Mick Mullen sent by facsimile to Sherry Miller of the First Assembly of God, Fremont, California a letter and fraudulent buy-out demand. The buy-out demand was based on fraudulently obtained IKON Amendments
ii. 07/02/02	Louise Candolesas (IKON) Sherry Miller	Louise Candolesas sent to Sherry Miller of the First Assembly of God, Fremont, California, a facsimile with a fraudulent buy-out demand. The buy-out demand was based on fraudulently obtained IKON Amendments.
iii. 10/30/03	Lisa Begley (IKON) Katy Dubnoff	Lisa Begley sent to Katy Dubnoff of Erin Engineering & Research, Walnut Creek California, a fraudulent buy-out demand. The buy-out demand was based on fraudulently obtained IKON Amendments and fraudulently misrepresented that it was the sum of

			stream of payment owing, unfunded principle (sic) and current FMV.
iv.	02/09/04	Ray Rivera (IKON) Kathy Doud	Ray Rivera e-mailed to Kathy Doud of Ridgecrest Regional Hospital, Ridgecrest, California, a fraudulent $471,000 buy-out demand which was fraudulent in that: (a) it was based on fraudulently obtained Flexed IKON Amendments; (b) it was based on an IKON forgery on an IKON Amendment; (c) it covered equipment IKON did not have at the Hospital; and (d) it fraudulently added a six (6) month delay in IKON signing an Amendment.
v.	03/29/04	Janelle Wisner (IKON) Randy Kohl	Janelle Wisner sent to Randy Kohl of Pacific Coast Producers, Woodland, California, by facsimile a fraudulent buy-out quote. This buy-out quote was fraudulent in that it was based on fraudulently obtained IKON Amendments.
vi.	05/19/04	Jeanie Jacks (GE) Carolyn Fisher	Jeanie Jacks sent to Carolyn Fisher at Galgon Industries, Fremont

			California a fraudulent buy-out quote. This buy-out quote was fraudulent in that it was based on fraudulently obtained IKON Amendments.
vii.	08/04/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulently obtained and forged IKON Amendments alleged to support the $471,000 buy-out demand.
viii.	08/06/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David. Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the

			Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
ix.	08/16/04	Kelly Mitchell (GE) Kathy Doud	Kelly Mitchell sent a facsimile to Kathy Doud of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that they covered equipment that IKON did not have at the Hospital.
x.	08/16/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c)

			they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xi.	08/20/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xii.	08/20/04	Ken Griffith (IKON) Kathy Doud	Ken Griffith called Kathy Doud of Ridgecrest Regional Hospital with fraudulent misrepresentations in support of a

		proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xiii. 09/21/04	Ken Griffith (IKON) David Mechtenberg Kathy Doud	Ken Griffith sent an email to David Mechtenberg and Kathy Doud of Ridgecrest Regional Hospital with fraudulent misrepresentations about monies owed by the Hospital. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they

			fraudulently added a six (6) month delay in IKON signing an Amendment.
xiv.	09/21/04	Ken Griffith (IKON) David Mechtenberg	Ken Griffith e-mailed to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, a fraudulently obtained IKON Amendment. The IKON Amendment had also been forged by IKON to change the dates of signing and to extend the term of the "flex" by 16 months
xv.	10/12/04	Benjamin Hilton (GE) Jan Fanucchi	Benjamin Hilton sent by mail two fraudulent buy-out demands to Jan Fanucchi at Mediasmith, Inc., San Francisco, California. The buy-out demands were fraudulent in that they were based on a fraudulently obtained IKON Amendment, did not break out lease-end charges and did not represent actual charges for which the customer was liable.
xvi.	10/14/04	Benny Hilton (GE) Rhonda Miller	Benny Hilton sent to Rhonda Miller of Foundry Networks a fraudulent buy-out demand for

$116,992.13 with fraudulent lease-end charges. The buy-out demand was fraudulent in that it was based on fraudulently obtained Flexed IKON Amendments. The lease-end charges were fraudulent in that they did not represent actual charges for which the customer was liable.

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

RESPONSE

	Time	By Whom and To Whom Made	Place Made and Contents
i.	06/06/02	Mick Mullen (IKON) Sherri Miller	Mick Mullen sent by facsimile to Sherry Miller of the First Assembly of God, Fremont, California a letter and fraudulent buy-out demand. The

			buy-out demand was based on fraudulently obtained IKON Amendments
ii.	07/02/02	Louise Candolesas (IKON) Sherri Miller	Louise Candesas sent to Sherry Miller of the First Assembly of God, Fremont, California, a facsimile with a fraudulent buy-out demand. The buy-out demand was based on fraudulently obtained IKON Amendments.
iii.	10/30/03	Lisa Begley (IKON) Katy Dubnoff	Lisa Begley sent to Katy Dubnoff of Erin Engineering & Research, Walnut Creek California, a fraudulent buy-out demand. The buy-out demand was based on fraudulently obtained IKON Amendments and fraudulently misrepresented that it was the sum of stream of payment owing, unfunded principle (sic) and current FMV.
iv.	02/09/04	Ray Rivera (IKON) Kathy Doud	Ray Rivera e-mailed to Kathy Doud of Ridgecrest Regional Hospital, Ridgecrest,

			California, a fraudulent $471,000 buy-out demand which was fraudulent in that: (a) it was based on fraudulently obtained Flexed IKON Amendments; (b) it was based on an IKON forgery on an IKON Amendment; (c) it covered equipment IKON did not have at the Hospital; and (d) it fraudulently added a six (6) month delay in IKON signing an Amendment.
v.	03/29/04	Janelle Wisner (IKON) Randy Kohl	Janelle Wisner sent to Randy Kohl of Pacific Coast Producers, Woodlands, California, by facsimile a fraudulent buy-out quote. This buy-out quote was fraudulent in that it was based on fraudulently obtained IKON Amendments.
vi.	05/19/04	Jeanie Jacks (GE) Carolyn Fisher	Jeanie Jacks sent to Carolyn Fisher at Galgon Industries, Fremont California a fraudulent buy-out

		quote. This buy-out quote was fraudulent in that it was based on fraudulently obtained IKON Amendments.
vii. 08/04/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulently obtained and forged IKON Amendments alleged to support the $471,000 buy-out demand.
viii. 08/06/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David. Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery

			on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
ix.	08/16/04	Kelly Mitchell (GE) Kathy Doud	Kelly Mitchell sent a facsimile to Kathy Doud of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that they covered equipment that IKON did not have at the Hospital.
x.	08/16/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital,, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were

			fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xi.	08/20/04	Kelly Mitchell (GE) David Mechtenberg	Kelly Mitchell sent a facsimile to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest, California, with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment

		IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xii. 08/20/04	Ken Griffith (IKON) Kathy Doud	Ken Griffith called Kathy Doud of Ridgecrest Regional Hospital with fraudulent misrepresentations in support of a proposal for a GE Copier Contract. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.
xiii. 09/21/04	Ken Griffith (IKON) David Mechtenberg	Ken Griffith e-mailed to David Mechtenberg of Ridgecrest Regional Hospital, Ridgecrest,

		California, a fraudulently obtained IKON Amendment. The IKON Amendment had also been forged by IKON to change the dates of signing and to extend the term of the "flex" by 16 months
xiv. 09/21/04	Ken Griffith (IKON) David Mechtenberg	Ken Griffith sent an email to David Mechtenberg and Kathy Doud of Ridgecrest Regional Hospital with fraudulent misrepresentations about monies owed by the Hospital. The misrepresentations were fraudulent in that: (a) they were based on fraudulently obtained Flexed IKON Amendments; (b) they were based on an IKON forgery on an IKON Amendment; (c) they covered equipment IKON did not have at the Hospital; and (d) they fraudulently added a six (6) month delay in IKON signing an Amendment.

xv.	10/12/04	Benjamin Hilton (GE) Jan Fanucchi	Benjamin Hilton sent by mail two fraudulent buy-out demands to Jan Fanucchi at Mediasmith, Inc., San Francisco, California. The buy-out demands were fraudulent in that they were based on a fraudulently obtained IKON Amendment, did not break out lease-end charges and did not represent actual charges for which the customer was liable.
xvi.	10/14/04	Benny Hilton (GE) Rhonda Miller	Benny Hilton sent to Rhonda Miller of Foundry Networks, Alviso, California, a fraudulent buy-out demand for $116,992.13 with fraudulent lease-end charges. The buy-out demand was fraudulent in that it was based on fraudulently obtained Flexed IKON Amendments. The lease -end charges were fraudulent in that they did not represent actual charges for which the customer was liable.

d. State whether there has been a criminal conviction for violation of the predicate acts;

RESPONSE

Plaintiffs are aware of no criminal conviction for violation of any of the predicate acts.

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

RESPONSE

Plaintiffs are aware of no civil litigation which has resulted in a judgment in regard to any of the predicate acts.

f. Describe how the predicate acts form a "pattern of racketeering activity"; and

RESPONSE

f. The sixteen (16) examples of predicate acts are spread over nearly 2½ years and involve seven (7) different IKON and GE accounts and nine (9) different IKON and GE personnel. They all fall precisely within the same pattern of racketeering activity and the alleged Unfair Practices of IKON and GE, as set out in greater detail in the Response to Question 2.a., above and in the First Amended Complaint. Specifically they include: (a) fraudulently obtaining Flexed IKON Contracts which the customers did not realize;

(b) using the Flexed IKON Contracts as a means of obtaining fraudulent buy-out payments; (c) failing to break down buy-out demands to conceal the flexed contracts and fraudulent demands; (d) making fraudulent buy-out demands on top of the fraudulently obtained Flexed IKON Contracts, including those based on IKON forgeries or equipment customers did not have; and (e) making lease-end payment demands which did not represent actual charges for which the customer was liable. These had the same purposes. IKON and GE, in every instance, intended to obtain more monies from the customer than the customer thought they had contracted for or to prevent the customer from leaving IKON or GE. The methods utilized in committing the offenses were the same. The results were similar, IKON and GE either kept the customer, obtained large buy-outs or have large buy-out claims pending. The damages were of the same nature, with the customers paying more for their Copier Equipment and Copier Service or with the customer or competitor paying large buy-outs and lease-end payments to IKON or GE.

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

RESPONSE

g. The alleged predicate acts relate to a common plan, which IKON and IOS Capital initially set up and carried out, and which GE, beginning in March 31, 2004, helped IKON carry on, or carried on by

itself and from which GE has reaped the benefits. The common plan was partially set out in writing in IKON's own "Image Management Plus Flex Program" "Field Training Manual." "This Manual states that "the sales representative's ***primary objective*** in flexing is ***to extend the term beyond the original expiration date*** [of the IKON Contract]." (Emphasis supplied.) This extension, the Manual also states, "***creates separation from the competition*** at the end of the original Agreement term . . [because] . . . the IKON sales upgrade number is based upon the original expiration date of the Image Management PLUS Agreement, while ***the competition's cost to upg ade includes all term extension periods***" (emphasis supplied) and that the object of the "flex" is to make it "***virtually impossible for competition to penetrate [the customer's] account***" (emphasis in original). GE is now clearly participating in the common plan by collecting large buy-outs based on Flexed IKON Contracts it bought (as GE did from Foundry Networks and MediaSmith) and using the Flexed IKON Contracts to try to take renewals away from the competition because its "number is based upon the original expiration date of the Image Management PLUS Agreement" and the "competition's cost upgrade includes all term extension periods" (as GE did with Ridgecrest Regional Hospital).

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

RESPONSE

The alleged enterprise and the descriptions which follow are the same for the claims under both § 1962(c) and § 1962(d).

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

RESPONSE

a. The enterprise consists of the association in fact of separate legal entities which provide IKON customers with "Copier Equipment" (copiers, printers and facsimile equipment and related servers, network equipment, accessories and software); "Copier Service" (supplies, parts and service); "IKON Contracts" (equipment financing for Copier Equipment bundled with supplies, parts and service) and administration of the IKON Contracts. These separate legal entities include, IKON, Office Solutions, Inc. which sells the Copier Equipment and provides the Copier Service; the Copier Equipment manufacturers (Canon, USA, Inc., Ricoh Corporation, Savin Corporation, One North America, Inc., Hewlett Packard Company) which provide the Copier Equipment; the entities which provide financing to buy the Copier Equipment

from the manufacturers (IOS Capital, Inc., General Electric Capital Corporation); and the entities which assist in administering the IKON Contracts (Experian, Inc., Duane Morris, LLP, Barry & Randolph, LLP).

b. Describe the structure, purpose, function and course of conduct of the enterprise;

RESPONSE

b. The structure of the "enterprise" consists of contracts by and between the legal entities associated in fact, which contracts are for the purpose of providing IKON customers with Copier Equipment, Copier Service and IKON Contracts. These contracts consist of distributorship agreements between IKON and Canon, USA, Inc., Ricoh Corporation, Savin Corporation, One North America, Inc. and Hewlett Packard Company; the agreement between IKON and GE of March 31, 2004 under which GE provides lease financing and administration of financing for Copier Equipment and Copier Service under IKON Contracts and funds and services future lease originations of IKON on a preferred basis; the agreements under which IKON provides credit information to Experian, Inc. f/k/a TRW and other credit reporting agencies; and the retainer agreements with Duane Morris LLP, Barry & Randolph LLP and other law firms under which IKON contracts for legal services to enforce IKON Contracts. These contracts provide the mechanism for decision making and for controlling and

directing the affairs of the "enterprise" on an ongoing basis. The "enterprise" thereby had a continuity of structure and personnel (as witnessed, for example, by GE's acquisition of IOS Capital, Inc. on March 31, 2004 in which GE took over all of the some 450 personnel of IOS Capital which administer IKON Contracts.)

The common and shared purpose of the "enterprise" is to provide IKON customers with Copier Equipment, Copier Service and IKON Contracts, to administer those IKON Contracts and to try to renew or extend those IKON Contracts. The function and course of conduct of the "enterprise" is to provide the IKON customers with Copier Equipment, Copier Service and IKON Contracts, to administer those IKON Contracts and to try to renew or extend those IKON Contracts. IKON and GE make proposals and take orders from customers for Copier Equipment and Copier Service. These are usually customers with existing IKON Contracts (whether owned by IKON or GE). These orders are filled by the purchase of Copier Equipment from a manufacturer, usually Canon, USA, Inc., Ricoh Corporation, Savin Corporation, One North America, Inc. or Hewlett Packard Company. Money to finance the IKON Contract was formerly provided by IOS Capital but now is provided by GE, with this money generally raised through the sale of debt securities. IKON purchases the parts and supplies to provide the Copier Service, again usually from the Copier Equipment manufacturer and supplies the labor to perform the Copier Service. The

IKON Contracts are centrally administered (monthly billings, sales taxes, property taxes, insurance, generally from the Macon, Georgia facility owned by IOS Capital until March 31, 2004 when GE bought the facility and took over the employees, although some administration functions are performed by IKON and GE personnel in various locations throughout the United States. Both IKON and GE personnel are involved in trying to renew and extend the IKON Contracts.

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

RESPONSE

c. No defendants are employees, officers, or directors of the alleged enterprise.

d. State whether any defendants are associated with the alleged enterprise;

RESPONSE

d. Both defendants, IKON and GE, are associated with the alleged enterprise.

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

RESPONSE

e. The defendants, IKON and GE, are persons distinct from the enterprise and are members of the group comprising the enterprise.

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

RESPONSE

f. Neither of the defendants IKON or GE are alleged to be the enterprise itself. They are members of the group comprising the enterprise and are perpetrators of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

RESPONSE

The pattern of racketeering activity is separate from the enterprise and differs from the usual and daily activities of the enterprise.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

RESPONSE

The usual and daily activities of the enterprise, to provide IKON customers with Copier Equipment, Copier Service and IKON Contracts, to administer those IKON Contracts and to try to renew or extend those IKON Contracts, described above, in the Response to Question 6.b., differ from the pattern of racketeering activity in general because each of these activities can be and are, within the enterprise, conducted legally.

Specifically, some IKON customers are provided with Copier Equipment, Copier Service, IKON Contracts, administration of those IKON Contracts and the renewal or extending of those IKON Contracts, without being subject to "flexing" and to the other Unfair Business Practices which constitute the pattern of racketeering activity. Only in some circumstances are IKON customers fraudulently induced to sign IKON Contracts and IKON Amendments, and, thereafter, subject to the other Unfair Business Practices which may accompany a Flexed IKON Contract.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

RESPONSE

The enterprise receives substantial financial benefits from the alleged pattern of racketeering. The billings for Copier Equipment for Flexed IKON Contracts, beyond the original term of the IKON Contract have considerably higher margins and profit than the standard in the copier industry. The Copier Service for Flexed IKON Contracts, extending beyond the original term of the IKON Contract is not subject to competitive bids and the ensuing lower prices and lower margins and profits. The IKON customers who are locked-in by Flexed IKON Contracts are considerably less likely to switch to competitors, resulting in renewals at a higher rate (and with higher margins and profits) than the standards in the copier industry and in increased business (with the accompanying margins and profits) for the enterprise and its members in providing Copier Equipment, Copier Service, contracts, financing and administration of such contracts. Where IKON customers choose to terminate the Flexed IKON Contract, the buy-out costs and lease end charges associated with the Unfair Business Practices produce huge margins and profits.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

RESPONSE

IKON and GE enter into contracts, sell Copier Equipment and provides Copier Service in every state in the United States. Copier Equipment sold by IKON and GE travels in foreign and interstate commerce, generally being manufactured abroad and delivered from ports of entry and centralized distribution facilities. Copier Equipment returned to IKON or GE travels in interstate and foreign commerce. The administration of IKON Contracts, IKON Amendments and Flexed IKON Contracts for all states in the United States is located in Macon, Georgia, with billing originating in Georgia.

The bills for IKON Contracts and Flexed IKON Contracts as well as the buy-outs for Flexed IKON Contracts are paid from every state in the United States to the GE facility in Macon, Georgia.

11. If the complaint alleges a violation of 18 U.S.C. §1962(a), provide the following information.

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

RESPONSE

The complaint does not allege a violation of 18 U.S.C. § 1962(a).

12. If the complaint alleges a violation of 18 U.S.C. §1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

RESPONSE

The complaint does not allege a violation of 18 U.S.C. § 1962(b).

13. If the complaint alleges a violation of 18 U.S.C. §1962(c), provide the following information:

a. State who is employed by or associated with the enterprise; and

RESPONSE

a. The enterprise has no employees. Those associated in fact with the enterprise are include, IKON, Office Solutions, Inc. which sells the Copier Equipment and provides the Copier Service; the Copier Equipment manufacturers (Canon, USA, Inc., Rich Corporation, Sabin Corporation, One North America, Inc., Hewlett Packard Company) which provide the Copier Equipment; the entities which provide financing to buy the Copier Equipment from the manufacturers (IOS Capital, Inc., General Electric Capital Corporation); and the entities which assist in administering the IKON Contracts (Experian, Inc., Duane Morris, LLP, Barry & Randolph, LLP,).

b. State whether the same entity is both the liable "person" and the "enterprise" under §1962(c).

RESPONSE

b. The same entity is not both the liable "person" and the "enterprise" under § 1962(c). IKON and GE are the liable "persons" under § 1962(c). Neither of them is alleged to be the "enterprise" itself. Nor do both of them together comprise the enterprise.

14. If the complaint alleges a violation of 18 U.S.C. §1962(d), describe in detail the alleged conspiracy.

RESPONSE

Beginning in or about 1996 and continuing through the present, IKON conspired with its outside counsel, including Barry & Randolph LLP, for such counsel to assist IKON in collecting sums alleged to be owing under fraudulently obtained Flexed IKON Contracts, including monthly billings and buy-out amounts and for fraudulent lease-end demands. The object of the conspiracy was to obtain payments from IKON customers for IKON Flexed Contracts and for lease-end demands which the customer did not agree to and for which the customer was not legally liable. IKON's outside counsel knew that the customer was not legally liable for the billings and demands for buy-outs which were based on the Flexed IKON Contracts and for such lease-end payments. IKON agreed with its outside counsel that it would make

demands based on the fraudulent Flexed IKON Contracts and for the fraudulent lease-end payments. IKON engaged in overt acts in furtherance of the conspiracy, including sending fraudulent billings and demands for buy-outs based on the Flexed IKON Contracts and for lease-end payments and threats of litigation over non payment of such fraudulent billings and demands through the mail and over the wires. IKON and its outside counsel knew through the repeated recurrence of the above actions, that they constituted a pattern of racketeering activity.

Beginning in or about March 2004 and continuing through the present, IKON conspired with GE to assist IKON in collecting sums alleged to be owing under fraudulently obtained Flexed IKON Contracts, including monthly billings and buy-out amounts for fraudulent lease-end demands. The object of the conspiracy was to obtain payments from IKON customers, whether the leases were owned by IKON or GE, for Flexed IKON Contracts and for lease-end demands which the customer did not agree to and for which the customer was not legally liable. GE knew that the customer was not legally liable for the billings and demands for buy-outs which were based on the Flexed IKON Contracts for the such lease-end payments. IKON and GE agreed that they would both make demands based on the fraudulent Flexed IKON Contracts and for the fraudulent lease-end payments and would work together to renew the IKON customer's contract for Copier Equipment and Copier

Service or to collect the billings, buy-outs and lease-end payments. Both IKON and GE engaged in overt acts in furtherance of the conspiracy including sending fraudulent billings and demands for buy-outs based on the Flexed IKON Contracts and for lease-end payments and threats of litigation over non payment of such fraudulent billings and demands through the mail and over the wires. IKON and GE knew through the repeated recurrence of the above actions, that they constituted a pattern of racketeering activity.

15. Describe the alleged injury to business or property.

RESPONSE

Plaintiffs suffered direct injury to their businesses and property by reason of the violations of § 1962 by IKON and GE in the following respects. (1) Plaintiffs paid monies directly to IKON and GE based on fraudulently obtained IKON Contracts and IKON Amendments and Unfair Business Practices which form the basis for the alleged violations of § 1962. (See, Response to Question No. 2) (2) Plaintiffs were foreclosed from specific accounts based on fraudulently obtained IKON Contracts and IKON Amendments and Unfair Business Practices which form the basis for the alleged violations of § 1962. (See, Response to Question No. 2)

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

RESPONSE

In each of these two (2) respects: (a) Plaintiffs' injuries were the direct result of the alleged violations of § 1962 and not derivative of injury to another party since the monies paid by Plaintiffs directly to IKON and the foreclosure were based on fraudulently obtained IKON Contracts and IKON Amendments and Unfair Business Practices which form the basis for the alleged violations of § 1962; (b) Plaintiff competitors were the intended target of the alleged violations of § 1962, both as to the exorbitant "buy-out" payments and foreclosure because the IKON's "Image Management Plus Flex Program" "Field Training Manual" states that "the sales representative's ***primary objective*** in flexing is ***to extend the term beyond the original expiration date*** [of the IKON Contract]." (Emphasis supplied.) This extension, the Manual states, "***creates separation from the competition*** at the end of the original Agreement term . . . [because] . . . the IKON sales upgrade number is based upon the original expiration date of the Image Management PLUS Agreement, while ***the competition's cost to upgrade includes all term extension periods***" and that the object of the "flex" is to make it "***virtually impossible for competition to penetrate [the customer's] account.***" (Emphasis supplied.) (c) These types of injury were reasonably foreseeable consequences of the alleged violations of

§ 1962 because IKON itself foresaw them as the intended and desired consequence. (d) There are no independent causes which have intervened between the alleged violations of § 1962 and the injury, because the damages are an immediate consequence of, and directly calculated from the "flex."

17. List the damages sustained for which each defendant is allegedly liable.

RESPONSE

The payments made to IKON and GE on Flexed IKON Contracts by plaintiffs and which form the basis for damages that IKON and GE are liable include the following:

Entity With Flexed Contract	Date Payment Made	Payment Made To	Amount
Delaney, Mitchell & Lander, Cas, San Francisco, California	12/04/00	IKON	$23,122
Erin Engineering, Walnut Creek, California	01/21/04	IKON	$14,678
First Assembly of God, Fremont, California	12/30/02	IKON	$101,041
Fondly Networks, Alviso, California	10/26/04	GE	$130,608
Kathryn Delmar Burke School	09/10/02	IKON	$28,459
Mediasmith, Inc., San Francisco, California	11/05/04	GE	$14,404

Mektec International, San Jose, California	06/12/03	IKON	$15,167
Seton Medical Center, Daly City, California	11/19/02	IKON	$217,578
Seton Hospital, Daly City, California	05/30/02	IKON	$36,899

These damages are not comprehensive, since the extent of monies paid by each plaintiff to IKON and GE based on fraudulently obtained IKON Contracts, IKON Amendments, Flexed IKON Contracts and Unfair Business Practices cannot be fully determined without discovery from IKON, GE and the customers involved.

The damages for which IKON and for which GE are liable, based on plaintiffs being foreclosed from the specific accounts include the following.

Name of Account	Date of Foreclosure
J.H. Kelly, Vancouver, Washington	05/10/04
Galgon Industries, Fremont, California	05/18/04
Pacific Coast Producers, Woodland, California	03/16/04
Cascadia Behavioral Health Care, Portland, Oregon	04/28/04
California Nurses Association, Oakland, California	03/29/02
Corovan, Poway, California	11/22/04
Ilx Resorts, Phoenix, Arizona	08/11/04

Northern California Institute for Research & Education (Veterans Administration)	11/03
Folger, Levin & Kahn, San Francisco, California	11/22/04
Jackson & Wallace, San Francisco, California	03/09/04

These damages are not comprehensive, since the extent of foreclosure by IKON and GE as to each plaintiff based on fraudulently obtained IKON Contracts, IKON Amendments, Flexed IKON Contracts and Unfair Business Practices cannot be fully determined without discovery from IKON, GE and the customers involved.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

RESPONSE

Plaintiffs' First Amended Complaint pleads the following federal causes of action, in addition the to R.I.C.O. cause of action (Eighth Claim for Relief); (a) unreasonable restraints of trade, Section 1 of the Sherman Act, 15 U.S.C. § 1 (First Claim for Relief); (b) exclusive dealing arrangements, Section 1 of the Sherman Act, 15 U.S.C. § 1 (Second Claim for Relief); (c) *per se* tying, Section 1 of the Sherman Act, 15 U.S.C. § 1 (Third Claim for Relief); (d) rule of reason tying, Section 1 of the Sherman Act, 15 U.S.C. § 1 (Fourth Claim for Relief); (e) monopolization, 2 of the Sherman Act, 15 U.S.C. § 2 (Fifth Claim for Relief);

(f) attempted monopolization, Section 2 of the Sherman Act, 15 U.S.C. § 2 (Sixth Claim for Relief); (g) unfair competition, Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), (B) (Seventh Claim for Relief).

19. List all pendent state claims, if any.

RESPONSE

The pendent state claims in the original complaint included the following: (a) tortious interference with business relations (Tenth Claim for Relief); (b) unlawful, unfair and fraudulent business acts and practices pursuant to California Business & Professions Code § 17200 et seq. (Eleventh Claim For Relief); and (c) unfair, deceptive, untrue and misleading advertising pursuant to California Business & Professions Code §§ 17200 and 17500 et seq. (Twelfth Claim For Relief).

The Court in its "Order Granting IKON Office Solutions, Inc.'s and General Electric Capital Corporations's Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)" filed December 23, 2004, dismissed these claims "[b]ecause this Court has only supplemental jurisdiction over these claims and believes that they would be resolved most efficiently in state court . . . 28. U.S.C. § 1367(c)(3)."

Plaintiffs have therefore not pleaded in their First Amended Complaint any pendent state claims based on the supplemental jurisdiction of 28 U.S.C. 1367(a).

20. Provide any additional information that you feel would be helpful to the court in processing your RICO claim.

RESPONSE

None available at this time.

Dated: February 14, 2005

HENNEFER & WOOD

By: /s/ James A. Hennefer
James A. Hennefer
Attorney for Plaintiffs